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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

WILLIAM H. FAUVER, COMMISSIONER OF CORRECTIONS, AND JOSEPH CALL, DEPUTY DIRECTOR OF ADULT INSTITUTIONS,

Petitioners,

v.

TIMOTHY RYAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

When the court below ruled that, contrary to state law, the state Commissioner of Corrections was responsible for separating pretrial detainees from felons in a county jail, and that mere generalized knowledge of prison overcrowding defeated the qualified immunity of petitioners, did not that ruling conflict in principle with this Court's decisions in *Harlow v. Fitzgerald*, 457 *U.S.* 800 (1982), *Mitchell v. Forsyth*, 472 *U.S.* 511 (1985) and *Anderson v. Creighton*, 483 *U.S.* ___, *107 S.Ct.* 3034 (1987), and create a significant question of national importance to each state attempting to alleviate prison overcrowding?

LIST OF PARTIES

The parties to the proceedings below were petitioners William H. Fauver, Commissioner of Corrections, and Joseph Call, Deputy Director of Adult Institutions, and respondent Timothy Ryan. The respondent before this Court is Timothy Ryan.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

William H. Fauver, New Jersey Commissioner of Corrections, and Joseph Call, Deputy Director of Adult Institutions, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on November 2, 1988.

OPINIONS BELOW

The decision of the United States District Court for the District of New Jersey (Pa25)*, denying petitioners' motion for summary judgment has been officially reported at 674 *F. Supp.* 464.

The opinion of the United States Court of Appeals for the Third Circuit (Pa3), affirming the decision of the district court, is officially reported at 860 *F.*2d 1199.

JURISDICTION

The case was argued before the Court of Appeals on June 2, 1988 and was decided on November 2, 1988. This petition is being filed within 90 days of November 2, 1988, as extended by order of Associate Justice William J. Brennan dated January 31, 1989.

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* The designation Pa ___ refers to the appendix to this petition.

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 *U.S.C.* § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

42 *U.S.C.* § 1983 provides:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For any purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This action was brought by Timothy Ryan against petitioners William H. Fauver, State Commissioner of Corrections, and Joseph Call, State Deputy Director of Adult Institutions, and various county officials under 42 *U.S.C.* § 1983 seeking compensatory and punitive damages for injuries he suffered while incarcerated at the

Burlington County Jail when he became involved in a fight with another inmate, Maurice Scott.

Overcrowding in New Jersey state prisons and county jails of crisis dimensions has occurred for several years despite the efforts of public officials at all levels of government to alleviate it. Overcrowding has resulted in the housing of inmate populations far in excess of state prison capacities and in the inability of the commissioner of the New Jersey Department of Corrections to accept and house inmates as they are sentenced to the custody of the Department. It was in the midst of this crisis in prison overcrowding that the events in this case took place.

Petitioners' responsibility to administer state prison facilities is well recognized and undisputed. If the events in this case had occurred at a state facility, petitioners would not be here seeking review by this Court. However, in novel fashion, Ryan seeks to deprive these state officials of qualified immunity because of events which occurred at a separate, county-run jail which was beyond their control. The decision of the court of appeals denying these individuals qualified immunity conflicts in principle with prior holdings of this Court and should be corrected.

Ryan was arrested on Friday, September 30, 1983 for driving on the revoked list. In addition, a warrant was pending for his arrest as a result of his failure to appear for trial several months earlier on charges of drunk driving, refusing a breathalyzer test and driving without a

license (Ja378).* He was unable to post bail and was incarcerated in the Burlington County Jail. Five days later, on Tuesday, October 4, 1983, he became involved in a fight with another inmate, Maurice Scott, and was rendered a quadriplegic (Ja23, Ja24).

Maurice Scott had been placed in the Burlington County Jail on a 14 day sentence for possession of stolen property (Ja23). Because of that conviction he had also violated the conditions of parole on a previous sentence to state prison and was waiting for the county to transfer him to state prison (Pa6).

Ryan claimed that defendants, including these state officials who did not themselves operate the county jail, had been "deliberately indifferent and grossly negligent" in their care and treatment of him and had violated a right to be housed in a cell separate from an allegedly known and dangerous convicted offender in violation of the Fourteenth Amendment to the Constitution of the United States (Ja27 to Ja28).

In New Jersey, there are 21 separate counties, each of which operate its own county jail. Under statute, a county jail may be either under the "care, custody and control" of a county sheriff (*N.J.S.A.* 30:8-17) or of a county board of chosen freeholders (*N.J.S.A.* 30:8-19). In counties whose jails are under the control of a sheriff, the sheriff "shall have the care, custody and control of the county jail or jails and all prisoners therein, and shall be responsible for the conduct of any keeper appointed by

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* The designation Ja ___ refers to the joint appendix filed in the court of appeals.

him." *N.J.S.A.* 30:8-17. *See, Caldero v. Ferber,* 39 *N.J.* 314, 318 (1963) (historically all responsibility for jails fell to the sheriff).

In the event a county chooses to place the operation of a county jail under the control of its board of chosen freeholders, the board is vested "with the custody and control of the county jail, and of the prisoners therein, and with power to prescribe rules and regulations for the management and conduct thereof." *Hartman v. Board of Chosen Freeholders of Mercer County,* 127 *N.J.L.* 170, 173 (Sup. Ct. 1941). See also, *N.J.S.A.* 30:8-19. Under statute, a board of chosen freeholders may establish a wage system for prisoners who work, manage a workhouse, hire employees for a workhouse and make rules and regulations for its operation. *N.J.S.A.* 30:8-26, 8-27, 8-32, 8-40 to 8-43. Under either option, county jail personnel are employees of the county subject to control of the county governing body. *Gloucester County Bd. of Chosen Freeholders v. Public Employment Relations Commission,* 107 *N.J. Super.* 158 (App. Div. 1969), aff'd 55 *N.J.* 333 (1970). See also, *MacNeil v. Ann Klein,* 141 *N.J. Super.* 394, 403 (App. Div. 1976). ("[T]he care, operation and management of the various county jails and other similar facilities are by law the responsibility of either the county sheriffs or the county Boards of Freeholders").

In parallel fashion, the Commissioner of Corrections has the power to determine all matters relating to the administration of all state correctional institutions. The Commissioner of the State Department of Corrections is the "head" and chief executive officer of the Department of Corrections with jurisdiction over state correctional institutions. *N.J.S.A.* 30:1B-4. He administers the work of

the Department (30:1B-6(a)), and is empowered to determine all matters relating to the unified and continuous development of institutions within his jurisdiction (30:1B-6(f)), and to issue rules and regulations for the conduct of the Department's work and administration (30:1B-6(e)). He is also empowered to "promote a unified criminal justice system including the integration of State and local correctional programs and probation and parole services" (30:1B-6(o)). He may also approve comprehensive plans developed by a county under the County Correctional Policy Act of 1982. *N.J.S.A.* 30:8-16.8.

With respect to county jails, the Commissioner may promulgate rules and regulations "to establish minimum standards for such care, treatment, government and discipline." *N.J.S.A.* 30:1B-10. To enforce such rules and regulations, the Commissioner may bring a civil action against the warden, and the court may direct the warden to carry out such requirements as may be just and effectual. *N.J.S.A.* 30:1-16. In the event the Commissioner determines that a jail is in "willful and continuous disregard of the minimum standards," he may order a "phased restriction of admission of new inmates to such facility." *N.J.S.A.* 30:8-57(c). If a county fails to take appropriate corrective action, the commissioner may order a county to "immediately cease to admit all persons sent to said facility" (*Id.*), a virtually useless remedy in the current overcrowding environment. Thus, the Commissioner's power over a county jail is essentially regulatory, and he does not operate individual county jails.

In *Worthington v. Fauver,* 88 *N.J.* 183 (1982), the Supreme Court of New Jersey traced the historical beginnings of the current crisis in prison overcrowding. Prison

overcrowding in New Jersey first became a serious problem in New Jersey in 1975. Although mitigated somewhat from 1978 to 1980, the problem has reached crisis dimensions, not just in New Jersey but nationally. In New Jersey, the problem has been caused in large part by an increase in the number and length of custodial sentences following the effective date of the New Jersey Code of Criminal Justice, adopted in 1979, *N.J.S.A.* 2C:1-1 *et seq.* *Worthington v. Fauver, supra,* at 189.

Under statute, the Commissioner of Corrections is responsible to take custody of any inmate sentenced to a term of one year or greater within 15 days of sentence. *N.J.S.A.* 2C:43-10(e); *N.J.S.A.* 30:4-6. However, because state institutions were physically unable to receive them, the Commissioner was unable to fulfill that obligation. By 1981, approximately 480 offenders sentenced to state prison were being housed in county jails. *Worthington, supra,* at 189.

Moreover, certain counties were more burdened by state prisoners than others. In 1981, the Atlantic Conty Jail was at 121% of maximum rated capacity and housed 225 inmates, of whom 41 were state prisoners. However, certain other counties were only two-thirds or less full. *Id.* at 190.

In only 14 months, from September 1980 to December 1981, the state prison population grew by nearly 1000, from 3450 inmates to 4307 (Ja112). The youth complex grew from 2014 to 2549 (*Id.*). In the five years from 1981 to 1985, the state opened a total of 4,439 beds (Ja171). Those additional beds were created by converting areas in state institutions never designed for inmate housing,

such as hallways, gyms, recreation areas ands chapels, as well as by new construction of state institutions (Ja171).

In June 1981, because of overcrowding throughout the entire state, then Governor Brendan Byrne declared a state of emergency in state and county penal and correctional facilities (Ja47). In Executive Order No. 106 (June 14, 1981), Governor Byrne found that both state and county correctional institutions were overcrowded, but the Department of Corrections was "physically unable to accept from the sheriffs of the various counties the custody of inmates sentenced to the custody of the Commissioner of Corrections" (Ja47).

Under the Executive Order, the Governor conferred upon the Commissioner of Corrections the "authority to designate the place of confinement of all inmates confined in all state and county penal or correctional institutions" (*Id.*). The Governor further authorized the Commissioner to develop an appropriate compensation plan for the counties (Ja49). The Executive Order by its terms was intended to "efficiently allocate inmates of state and county penal and correctional institutions to those institutions having available space in order to alleviate overcrowding" (Ja47). Although the Executive Order authorized the Commissioner to designate appropriate places to house inmates, it did not change the basic responsibility of a county sheriff or board of chosen freeholders to properly run a county jail where such inmates might be housed. The Executive Order was declared valid by the Supreme Court of New Jersey in *Worthington v. Fauver, supra.* By subsequent executive order, the state of emergency was continued and was in effect at the time of this incident (Ja51 to Ja55).

The procedure to transfer state inmates from county jails to state facilities relied upon the counties to determine in common sense fashion which state inmates within their quota to transfer (Ja930-24 to Ja932-2). It was within a county's discretion to transfer inmates to the state in chronological fashion, that is, first in and first out, or in some other manner (Ja931-4 to 9). A county might transfer serious escape risks or inmates with serious medical problems ahead of others (Ja876-1 to 7). That procedure presented a sensible way to handle transfers to the state because county jail officials worked with such inmates on a day to day basis and were best situated to select those who presented risks and should be moved to a state institution.

In Burlington County, once given their weekly quota of state inmates to transfer, jail officials generally transferred inmates in chronological fashion, "first sentenced first shipped" (Ja447-3 to 15). However, county officials acknowledged that there were also instances when the county might "want to take somebody and move them to the top of the list" (Ja447-7 to 8). Jail officials indicated in depositions that that was done "in order to minimize some of our problems" (Ja448-20 to 22). However, in this case county jail officials kept Maurice Scott at the Burlington County Jail fully two months after he was eligible for transfer by the county to a state-run facility (Ja455-21 to 25).

The Burlington County Jail is a two-story building constructed of steel and masonry with a brick exterior. At a distance of about twenty feet from the building, twelve foot metal security fencing encloses the building on three sides topped with strands of razor ribbon (Ja220). Inmate

housing units are located on both floors. The first floor consists of several dormitory cells. The second floor consists of both dormitory and individual cells (Ja221), including 6 dormitory cells and 4 maximum security cell blocks (Pa37). Typically, a dormitory unit consists of 13 metal bunks, 1 shower, a toilet, urinal and a sink, although some are smaller, including the cell in which this incident occurred (Ja221). The individual cells have a toilet and sink, and a metal bunk with a mattress. They contain approximately 35 square feet of floor space and open into a gallery area separating the cell entrances from a corridor (Ja221).

In March 1981, Burlington County entered into a settlement agreement approved by United States District Judge Debevoise in June 1981 in a class action brought against county officials by various inmates challenging conditions at the jail. These state officials were not party to that action (Ja370 to Ja371). Among other things the settlement agreement provided for a cap on inmate population at 117 inmates, numerous modifications to the physical plant, including changes in the heating and ventilation system, increased artificial lighting, space for contact visits, and an outdoor area for physical exercise (Ja353 to Ja354). The settlement agreement also provided procedures for classification of inmates, inmate discipline, development of written policies for operation of the jail and an inmate manual (Ja367, Ja363, Ja358). Burlington County was not able to comply with the cap in population set forth in the settlement agreement. At the time of this incident, it also had not made the changes to

the physical plant or developed the procedures for operation of the jail and inmate classification provided for in the agreement (Ja289; Ja206 to Ja273).

County jail officials placed Ryan in cell 208, a dormitory cell with nine other inmates, although the consent agreement provided for a maximum in the cell of eight inmates (Ja23, Ja355). On the date of Ryan's arrest, the jail housed 145 inmates (Ja286). Over the weekend, the population increased to a high on Sunday, October 2, of 153 inmates, then dropped to 141 on Monday, October 3 (Ja287). On October 4, the day of this incident it had a population of 147 (*Id.*). Throughout those five days, however, the number of state inmates remained a fairly constant 22 to 24 (*Id.*). Thus, while Ryan was incarcerated at the jail, county officials were never able to keep the population of county inmates under the cap of 117 it had agreed to in the settlement agreement (Ja286 to Ja287).

According to the allegations of the complaint, prior to this incident, Maurice Scott, the inmate who injured Ryan, "was involved in several violent attacks on other individuals housed in cell 208" and "constantly threatened other prisoners and detainees in the prison" (Ja24). According to the Third Circuit, he had been convicted of a violent crime that resulted in injury or death of another inmate (Pa6), although jail records only stated that he had been convicted of theft (Ja379). It is undisputed that neither Commissioner Fauver nor Deputy Director Call had any knowledge of Scott. Further, although the county could have transferred Scott to a state facility as early as August 8, 1983, two months before this incident, they

failed to transfer him until some time after this event (Ja455-21 to 25). Further, although county jail officials had several dormitory cells in which they could have segregated their state-sentenced inmates, it is undisputed that they placed Scott in a cell with pretrial detainees and county-sentenced inmates. It is undisputed that neither Commissioner Fauver nor Deputy Director Call was aware of that action (Ja847-11 to 13; Ja825-21 to 25; Ja760-18 to 22).

Petitioners moved for summary judgment before the district court in part on the ground that they did not deprive Ryan of any clearly established rights and that they were entitled to qualified immunity. The district court denied that motion and held that "pretrial detainees have a constitutional right to be housed separately from known dangerous convicted inmates who pose a threat to their personal security unless physical facilities do not permit their separation" (Pa55; footnote omitted). The court further stated as follows with respect to qualified immunity:

> . . . it is quite true that [petitioners] were not explicitly charged with the day to day administration of the Burlington County Jail. But it is absolutely clear that the overriding purpose of Executive Order No. 106 was to create a central authority for all penal institutions in the state . . . [Pa60].

The court stated that "[w]hile the jury may well find that the acts of Fauver and Call were not a proximate cause of plaintiff's injuries, those same acts mandate that Fauver and Call's motion for summary judgment on the ground of qualified immunity be denied" (Pa62).

Petitioners appealed the district court decision to the United States Court of Appeals for the Third Circuit, which affirmed the decision of the district court. The Third Circuit first determined that it properly had jurisdiction of the appeal under the collateral order doctrine (Pa12). It summarized petitioners' arguments as follows:

> They fairly can be described as assertions that (1) Fauver and Call owed Ryan no clearly established duty to take affirmative action to ensure that his constitutional rights were not violated by others and (2) given the information they had, a reasonable official would not have known he was violating Ryan's constitutional rights. (Pa11 to Pa12; footnote omitted).

The court of appeals properly held that Commissioner Fauver and Deputy Director Call "are entitled to review of these arguments before trial," and denied a motion by Ryan to dismiss the appeal (Pa12).

However, on the merits of the qualified immunity issue, the court of appeals held that these public employees were not entitled to qualified immunity. In far-reaching language, the court stated that "Fauver and Call were given authority under Executive Order No. 106 to coordinate housing between state and county facilities and thus to take actions that affected conditions in county facilities" (Pa16 to Pa17). The court held that "[c]onsidering the information available to Fauver and Call, no official of their stature could reasonably have thought that continuing to place state inmates in the Burlington County Jail with no more than an *ad hoc* system for their removal was lawful" (Pa24). Contrary to the language of Executive Order No. 106, which only authorized Commissioner Fauver to allocate inmates to state and county

correctional facilities, the court stated that petitioners' "failure to take steps to institute a system designated to permit the separation of pretrial detainees from felons, given the information they had, defeats their claim of qualified immunity," and remanded the matter to the district court (Pa18).

That holding places upon a state commissioner of corrections a duty to impose himself into the numerous independent housing decisions of all the 21 autonomous county jails in New Jersey. That duty has nowhere previously been established and is contrary to well settled state law. If permitted to stand, that opinion virtually assures that any state commissioner of corrections acting in good faith to alleviate prison overcrowding will be forced to trial for events which occur in all of the independent county jails of which he may be unaware and over which he has no control.

The opinion of the court of appeals conflicts in principle with prior holdings of this Court, and petitioners ask this Court to review this important matter under the Constitution.

REASONS FOR GRANTING THE WRIT

AN AUTHORITATIVE DECISION OF THIS COURT IS NECESSARY TO RESOLVE AN APPARENT CONFLICT BETWEEN THE COURT OF APPEALS AND THE REASONING UNDERLYING THIS COURT'S HOLDINGS IN *HARLOW v. FITZGERALD, MITCHELL v. FORSYTH, AND ANDERSON v. CREIGHTON.*

The decision of the Third Circuit conflicts in principle with opinions of this Court in *Harlow v. Fitzgerald*, 457 *U.S.* 800 (1982), *Mitchell v. Forsyth*, 472 *U.S.* 511 (1985),

and *Anderson v. Creighton*, 483 *U.S.* ___, 107 *S.Ct.* 3034 (1987). Moreover, this case involves issues of public importance of national interest concerning prison overcrowding and the personal liability under 42 *U.S.C.* § 1983 of state corrections officials for injuries occurring in a county jail and allegedly caused by their efforts to alleviate overcrowding.

The Third Circuit Court of Appeals denied petitioners qualified immunity although petitioners did not violate any clearly established rights of respondent's, possessed only a general knowledge that a county jail was overcrowded, knowledge that any corrections official would possess under similar circumstances, and had no authority or duty to run the county jail. Although the Court of Appeals purported to follow holdings of this Court in *Harlow, Mitchell* and *Anderson*, the opinion is the legal equivalent of a wolf in sheep's clothing. If allowed to stand, it would virtually eradicate qualified immunity for corrections officers who because of widespread prison overcrowding must utilize county facilities to handle inmate overflow. Prison overcrowding is a nationwide problem, and a decision in this area will have ramifications throughout the entire country. This Court should exercise jurisdiction in this case to clarify the standards under which state corrections officials attempting to alleviate prison overcrowding may invoke qualified immunity.

A. These State Officials Possessed No Clearly Established Duty To Separate Pretrial Detainees From Convicted Offenders In A Separate, Independent County Jail.

In *Harlow v. Fitzgerald, supra,* this Court recognized that "permitting damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability will unduly inhibit officials in the discharge of their duties." *Id.* at 814. Public officials require the protection of qualified immunity "to shield them from undue interference with their duties and from potentially disabling threats of liability." *Id.* at 806. Therefore, this court established an objective standard for application of qualified immunity. The Court summarized the objective standard as follows:

> . . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [*Id.* at 817].

The Court stated that "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Ibid.*

Mitchell v. Forsyth, supra, further discussed qualified immunity. In that case, involving a warrantless wiretap, this Court held that *Harlow* " . . . purged qualified immunity doctrine of its subjective components and held that government officials performing discretionary functions generally are shielded from liability for civil damages

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 517. Qualified immunity is "an immunity from suit rather than a mere defense to liability, and like an absolute immunity, it is effectively lost if a case is permitted to go on trial . . . " *Id.*

The bedrock principle of qualified immunity is that it is "measured by reference to clearly established law." *Harlow v. Fitzgerald, supra,* 457 *U.S.* at 818. This Court further described this fundamental principle as follows:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. [*Ibid.*; footnote omitted].

In *Mitchell v. Forsyth, supra,* this Court specifically stated as follows:

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts [*Mitchell v. Forsyth, supra,* 472 *U.S.* at 525; citation omitted].

The plain vanilla teaching of these cases is that to defeat qualified immunity a plaintiff must demonstrate that the

actions of a public official violated clearly established law.

In the present case, the Third Circuit improperly concluded that Commissioner Fauver and Deputy Director Call had a clearly established duty to "take steps to institute a system designed to permit the separation of pretrial detainees from felons" (Pa18). That holding is simply unfounded. Nowhere can such a duty be found in any statute or constitutional principle prior to that decision of the Third Circuit.

Prior to this holding of the Third Circuit, it was well established that the responsibility to operate a county jail, including decisions as to where within a jail to house inmates, was conferred upon either a county sheriff or a county board of chosen freeholders, depending upon which system a county operated under. See, *e.g.*, *N.J.S.A.* 30:8-17 and *N.J.S.A.* 30:8-19. In reviewing the status of a county jail as one always of a county institution, the Supreme Court of New Jersey held in *Bd. of Chosen Freeholders v. Kaiser*, 75 *N.J.L.* 9, 15 (Sup. Ct. 1907), as follows:

> The jail is a *county* institution, and the burden of its maintenance has always rested upon the county. The funds necessary therefore, including the cost of food supplied to its inmates have always been paid out of the county treasury. By whatever system the payments are made, the sole obligation to make them rests upon the county. [75 *N.J.L.* at 15; emphasis supplied].

In reviewing the responsibility of a county jail warden and county sheriff to their county, the Court of Errors and Appeals, then the highest court in New Jersey, in *Sullivan v. McOsker*, 84 *N.J.L.* 380 (E. & A. 1912) held:

> [T]he warden of the common jail, in caring for it, is engaged in discharging a public duty in the interest of the people of Hudson *County*, cannot be successfully controverted. He, as well as the sheriff, is responsible to the *county* for any official neglect. . . . [*Id.* at 383; emphasis supplied].

In *MacNeil v. Ann Klein, supra,* 141 *N.J. Super.* at 403, a mandamus action in part seeking to compel the commissioner of the former Department of Institutions and Agencies, which was later replaced by the present Department of Corrections, to correct allegedly unconstitutional conditions in county jails, the Appellate Division of the Superior Court of New Jersey affirmed the dismissal of the action. The court specificaly held that "the care, operation and management of the various county jails and other similar facilities *are by law the responsibility of either the county sheriffs of the county boards of freeholders.*" (Emphasis supplied)

As noted earlier, the Commissioner of Corrections possesses regulatory powers over a county jail. He may promulgate rules and regulations "to establish minimum standards for such care, treatment, government and discipline." *N.J.S.A.* 30:1B-10. However, such rule making authority does not authorize him to hire and fire county corrections officers, provide food, medical or sanitary services in a county jail or actually assign inmates to specific cells. Rather, it is plain that in New Jersey county correctional institutions are under the care, custody and control of county officials, and the responsibility to take such actions plainly resides with county officials.

Executive Order No. 106 did not change that allocation of responsibilities. Executive Order No. 106 simply conferred upon the Commissioner of Corrections the

authority to allocate inmates among state and county facilities to alleviate overcrowding. Established state law concerning the responsibility of a county to hire and fire staff, prevent inmate assaults and provide for the management of a county jail, including the assignment of inmates to appropriate housing within the jail, remained unchanged.

Cases decided in both state and federal courts recognized that Executive Order No. 106 preserved intact the established responsibility of a county to properly operate its jail. By its terms, Executive Order No. 106 specifically provided that "the jails remain under local control" (Ja47). Further, in *Mayor & Council of Town of Kearny v. Clark*, 213 *N.J. Super.* 152 (App. Div. 1986), decided after promulgation of the Executive Order, the Appellate Division stated as follows:

> *County* officials are vested with authority to take over custody of county jails. *N.J.S.A.* 30:8-19. Under the County Correctional Policy Act of 1982, the *county retains authority* for the implementation and operation of county correctional facilities. [*Id.* at 157].

In *Union County Jail Inmates v. DiBuono*, 713 F.2d 984, 993 (3d Cir. 1983), *cert.* denied, 465 *U.S.* 1102 (1984), the Third Circuit properly recognized that "given that the State has invoked [under Executive Order No. 106] its interest in allocation of space to require the County to retain state prisoners, the County's effective management of the jail must include management of the overcrowded institution." Thus, by its terms Executive Order No. 106 preserves intact local control of county jails, and cases decided after the promulgation of Executive Order No. 106 recognize that well settled principle.

The conclusion of the Third Circuit that Commissioner Fauver and Deputy Director Call had a clearly established duty to separate pretrial detainees from known and dangerous convicted inmates in a county, rather than a state, jail is woven out of whole cloth. The Third Circuit would have Commissioner Fauver personally direct the specific locations to which individual inmates in a county jail would be assigned within a jail even though such inmates might not be state-sentenced inmates. Executive Order No. 106 does not authorize such action by the Commissioner and no case prior to the decision now under review has imposed such a duty.

Thus, the Third Circuit would defeat the qualified immunity of these public employees even though they did not possess a clearly established duty to separate pretrial detainees from other inmates at the Burlington County Jail. That decision conflicts in principle with the holdings of this Court in *Harlow* and *Mitchell* and can only be corrected by this Court.

B. The Third Circuit Improperly Denied Petitioners Qualified Immunity Because Of A Mistaken But Reasonable Belief That County Officials Were Properly Managing The County Jail.

In *Anderson v. Creighton, supra,* this Court discussed the impact upon qualified immunity of a public official's mistaken belief in the lawfulness of his conduct. In that case, a police officer mistakenly believed that he had probable cause to search a house and that his failure to obtain a search warrant was justified by exigent circumstances. Justice Scalia, writing for a majority of the Court, stated that "it is inevitable that law enforcement officials

will in some cases reasonably but mistakenly conclude that probable cause is present." *Id.*, 107 *S.Ct.* at 3039. This Court specifically concluded, however, that such a mistake should not destroy the immunity. The Court stated as follows:

> The relevant question in this case, for example, is the objective (albeit fact – specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. [*Id.*, 107 *S.Ct.* at 3040].

Thus, this Court concluded that a public official may reasonably but mistakenly believe that the circumstances with which he is confronted do not violate clearly established rights and under such circumstances he will not be deprived of immunity.

In the present case, the lower court applied that standard in such a narrow manner that state corrections officials forced to use county facilities to handle an overflow of state-sentenced inmates will never be able to invoke qualified immunity in a prison overcrowding setting. The court grounded its denial of qualified immunity upon the undisputed knowledge of both Commissioner Fauver and Deputy Director Joseph Call that the Burlington County Jail was overcrowded, a letter from Burlington County Counsel to the Commissioner referring in conclusionary terms to "the potential of a major disaster" because of overcrowding and county jail inspection reports noting various dificiencies in the Burlington County Jail physical plant and suggesting that its limited facilities precluded effective classification in inmate housing assignments.

However, that information represents only general knowledge any state corrections commissioner possesses about any county jail. To defeat qualified immunity of a state corrections official simply upon such general knowledge about a county jail is to uniformly deny qualified immunity in any case in which inmate injuries at a county jail are alleged to be attributable to prison overcrowding. Such a result is contrary to the principles established by this Court in *Harlow, Mitchell* and *Anderson,* and should be corrected by this Court.

Specifically, with respect to knowledge of overcrowding, it is undisputed that both Commissioner Fauver and Deputy Director Call knew the Burlington County Jail was overcrowded, but so was every county jail in the state. Commissioner Fauver testified during depositions that " . . . all the counties were in the same predicament on the overcrowding" (Ja727-22 to 23). As to County Counsel's brief conclusionary letter to the Commissioner referring to "the potential of a major disaster" because of overcrowding, that letter did not inform the Commissioner of any particularized problems at the jail, except for overcrowding of which he was already aware. For example, that letter said nothing about sanitary conditions, quality of medical care or food service. It provided the Commissioner with no specific information about conditions unique to the Burlington County Jail which might cause him to believe that Burlington County was facing problems more serious than those commonly presented by overcrowding in all state and county facilities.

The same is true of the inspection reports. The court of appeals relied on state inspection reports which noted deficiencies in the Jail's physical plant, including small

cells, inadequate lighting and no space for indoor or outdoor recreational facilities (Pa22). However, those reports also noted that the Jail provided adequate heat, and that religious services, group counseling, and group meetings were conducted at the Jail. They stated that sanitation inspections were conducted on a daily basis by designated staff, the county health department had inspected the kitchen and given it a satisfactory rating, and medical services were provided every day of the week (Ja263, Ja264, Ja268).

The court of appeals also relied upon a conclusionary statement in the inspection reports that the Jails' "limited facilities preclude the possibility of an effective classification system with regard to housing assignments" (Ja244). However, the reports provided no details to alert the Commissioner to the presence of any major problems or link that statement with overcrowding. For example, it did not state that pretrial detainees were being housed with known and dangerous convicted offenders or that passive and aggressive inmates were housed together. Further, in depositions, Commissioner Fauver stated that he believed the Jail could still effectively classify inmates:

> There may be a classification system, maybe a superior officer making assignments, but somehow that inmate arrives at a cell, he arrives in a dormitory and that decision is made by a person or a group of persons there which would be a classification system no matter how primitive or sophisticated. [Ja805-3 to 10].

As noted earlier, the Jail was not just one large dormitory. It consisted of two floors with several dormitory cells and maximum security cells. If, as suggested by respondent, Scott was known to county officials to be dangerous, it

would have been a simple matter for the county to have housed Scott in one of those dormitory cells with other known dangerous inmates, completely segregating dangerous inmates from the rest of the inmate population. This the county did not do. Nothing in the inspection reports indicated that the county could not have utilized such a housing arrangement, and such an arrangement would have very simply and effectively avoided injury to Ryan.

Boiled down to its essential ingredients, the raw information available to Commissioner Fauver and Deputy Director Call was simply that the Burlington County Jail, like all other county jails, was overcrowded. As Commissioner Fauver stated, he "would not have looked at that by any stretch of the imagination as one of the severest in the state" and the Burlington County Jail "would be somewhere in the middle probably" (Ja773). Thus, the information available to Commissioner Fauver and Deputy Director Call did not set forth any unique problem at the Burlington County Jail not commonly faced by overcrowded jails in general.

Any commissioner of corrections would have had such general knowledge about prison overcrowding and, with that information, it was still reasonable to conclude that State sentenced inmates could be housed at the Burlington County Jail without violating rights of pretrial detainees. To defeat qualified immunity because of such superficial information is to effectively hold that any state commissioner of corrections forced to use county jails to handle inmate overflow must universally be subjected to the risk of trial in any case in which overcrowding in a county jail is alleged to have resulted in inmate injuries.

Such a holding is contrary to the policy of qualified immunity as articulated by this court in *Harlow, Mitchell* and *Anderson*. Former Chief Justice Warren E. Burger noted the serious problems facing our country because of prison overcrowding:

> In all but a minority of the States we confine the person in an overcrowded, understaffed institution with little or no library facilities, little if any educational program or vocational training. I have visited American prisons built more than 100 years ago for 800 prisoners, but with two thousand crowded today inside their ancient walls. [Remarks of Warren E. Burger, Annual Report to the American Bar Association (February 8, 1981)].

In New Jersey, from 1981 through 1985, more than 4,400 new beds were opened to alleviate prison overcrowding (Ja154; Ja156). As of spring 1987, expenditures at the State level to combat overcrowding totalled more than $446,000,000 (Ja171). As of May 1986, the State had paid counties a total of $78,629,569.57 to house state sentenced inmates (Ja170). Thus, prison overcrowding presents a serious, continuous problem of national proportions and substantial resources have been allocated to alleviate it.

However, if state commissioners of corrections throughout the country must face the prospect of substantial damage verdicts merely on the basis of only generalized knowledge of overcrowding, it will become impossible to find people willing to take those jobs and attempt to alleviate overcrowding in the public interest. This Court explained the risk succinctly in *Harlow* as follows:

> . . . it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty – at a cost not only to defendant officials, but to

> society as a whole. These social costs include the expense of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or most irresponsible [public officials] in the unflinching discharge of their duties. [*Harlow v. Fitzgerald, supra,* 457 *U.S.* at 814 (citation omitted)].

Thus, every state commissioner of corrections knows that county jails are overcrowded, and such general knowledge should not be enough to defeat qualified immunity.

This case presents for review significant questions of public importance under the Constitution of the United States. Commissioner Fauver and Deputy Director Call would not be seeking review of this matter if it involved injuries in a state-run facility. However, the responsibility of these state officials to personally segregate pretrial detainees from convicted offenders in a separate county jail is not established. Further, the court of appeals improperly seeks to defeat the qualified immunity of these public officials attempting to alleviate prison overcrowding simply because they possessed a general knowledge that the county jail was overcrowded.

Petitioners ask this Court to avoid the creation of an exception to the general rule of qualified immunity which would defeat qualified immunity for high level corrections officials attempting to alleviate overcrowding in the public interest. Only this Court can correct the conflict in principle with its holdings in *Harlow, Mitchell,* and *Anderson* which has been created by the court of appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER N. PERRETTI, JR.
Attorney General
of New Jersey

DOUGLASS L. DERRY
Deputy Attorney General

DATED: February 14, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5847

TIMOTHY RYAN

vs.

BURLINGTON COUNTY, NEW JERSEY, etc.

WILLIAM H. FAUVER, Commissioner of Corrections, and JOSEPH CALL, Deputy Director, Appellants

(D. C. Civil No. 85-2002)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, SLOVITER and HUTCHINSON, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel June 2, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the appellee's motion to dismiss the appeal is denied and the judgment of the said District Court, entered November 12, 1987, be, and the same is hereby affirmed. The cause is remanded to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellants.

ATTEST:
/s/ Sally Mrvos
Clerk

November 2, 1988

Costs taxed in favor of Appellee as follows:

BRIEF.....$135.80

Certified as a true copy and issued in lieu of a formal mandate on November 25, 1988.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals
for the Third Circuit

Timothy RYAN

v.

BURLINGTON COUNTY, NEW JERSEY et al.

Appeal of William H. FAUVER,
Commissioner of Corrections, and
Joseph Call, Deputy Director.

No. 87-5847.

United States Court of Appeals,
Third Circuit.

Argued June 2, 1988.

Decided Nov. 2, 1988.

W. Cary Edwards, Atty. Gen., James J. Ciancia, Asst. Atty. Gen., Douglass L. Derry, Deputy Atty. Gen. (argued) Trenton, N.J., for appellants.

Joseph Goldberg (argued), Slimm, Dash & Goldberg, Westmont, N.J., Albert Dragon, A. Dragon Associates, Philadelphia, Pa., for Timothy Ryan.

Before SEITZ, SLOVITER and HUTCHINSON, Circuit Judges.

OPINION OF THE COURT

HUTCHINSON, Circuit Judge.

Defendants William H. Fauver and Joseph G. Call appeal a district court order, 674 F. Supp. 464, denying their motion for summary judgment in a 42 U.S.C.A. § 1983 (West 1981) action brought by Timothy Ryan. Ryan sought compensatory and punitive damages for injuries he sustained while a pretrial detainee in the Burlington

County Jail. We have jurisdiction to review the district court's order as it pertains to Fauver and Call's claim of qualified immunity under 28 U.S.C.A. § 1291 (West Supp.1988). *See Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). We hold that Fauver and Call did not establish an entitlement to qualified immunity and, accordingly, will affirm the district court's order.

I.

The Burlington County Jail is a small, two story building in Mount Holly, New Jersey. Its first floor contains dormitory housing and its second contains maximum security cell blocks and six dormitory cells. In 1977 and 1978, inmates at the county jail brought civil rights actions against the county sheriff, his chief deputy and the Burlington Board of Chosen Freeholders, alleging, among other things, that the jail was overcrowded and that there was no effective classification procedure.[1] The cases were consolidated and eventually settled.[2] The Settlement Agreement limited the number of inmates that could be housed in individual and dormitory cells,

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[1] *Vespa v. Board of Freeholders of Burlington County*, Civ. No. 77-0765 (D.N.J. April 20, 1977) and *Morrison v. Brennan*, Civ. No. 78-0628 (D.N.J.March 28, 1978).

[2] On May 13, 1981, the Board of Chosen Freeholders, by resolution, assumed jurisdiction of the Burlington County Jail from the county sheriff, in part to effectuate the settlement of this litigation. App. at 274a. The Honorable Dickinson R. Debevoise approved the Settlement Agreement on June 1, 1981. *Id.* at 376a-78a.

"except in emergencies" capping the total number of inmates at the county jail at 117. Appendix (App.) at 354a-55a. The Agreement also provided for renovation of the county jail by June 22, 1983, to include an inmate reception area with at least eight individual detention rooms "for classification." *Id.* at 354a.[3]

On September 30, 1983, Timothy Ryan was arrested in Medford Township, New Jersey, and charged with motor vehicle violations. Because he could not make bail,

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[3] With respect to classification, the settlement agreement further provided:

> 38. Effective upon the completion of the [inmate reception area], inmates shall, upon admission, be held separately from the general population for the period required for completion of the procedures outlined in paragraph 39.
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> 39. Effective ninety (90) days from the date of this Order, all inmates shall be reviewed within sixty (60) hours of admission to determine their appropriate living area, degree of observation, medical, social and psychological services, and their eligibility for work assignments. Classification and re-classification decisions shall be made by a team including a correctional officer of the rank of Sergeant or above, a member of the psychological and social service services staff, and a member of the medical staff. Each inmate shall be advised in writing of a classification or re-classification decision and of his right to request in writing to the classification team a change of any aspect of his classification. The classification team shall render its determination as to each request for re-classification from any inmate within seventy-two (72) hours.

App. at 367a.

he was sent to the Burlington County Jail, where he was placed in a dormitory cell along with nine other persons.[4] One of these was Maurice Scott, who had violated the conditions of his parole on a state prison sentence and was awaiting transfer to a state facility. During the two-month period in which he was incarcerated at the county jail pending this transfer, Scott had been involved in several violent attacks on other inmates. Burlington County Jail documents show that Scott had been convicted of a violent crime that resulted in the injury or death of another person. *See id.* at 379a.

On October 4, 1988, Scott attacked Ryan. At some point after the attack, prison guards placed Ryan on a stretcher and carried him to the jail's infirmary. There, he was handcuffed and shackled before being taken by ambulance to a hospital. Hospital personnel determined that Ryan's neck had been broken, rendering him quadriplegic.

In April, 1985, Ryan brought an action seeking compensatory and punitive damages and attorney's fees under 42 U.S.C. §§ 1983, 1985 and 1988 (West 1981) against Burlington County; the Burlington County Board of Chosen Freeholders; the Warden of the Burlington County Jail; county prison guards and officials; the Burlington County Solicitor's office; Michael J. Hogan, part-time solicitor of Burlington County; William H. Fauver, Commissioner of the New Jersey Department of Corrections; and Joseph G. Call, Deputy Director of the Division

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[4] The Settlement Agreement limited the number of inmates in this cell to 8. App. at 355a.

of Adult Institutions. Ryan claimed that defendants overcrowded the Burlington County Jail, precluding effective classification of inmates and causing his injury, in violation of his liberty interest in personal security and his right as a pretrial detainee not to be punished prior to an adjudication of guilt.[5]

Defendants Fauver and Call filed a motion to dismiss the complaint or, in the alternative, for summary judgment on the basis of eleventh amendment immunity and qualified immunity. The district court reserved decision on this motion and ordered that Fauver and Call be deposed. After giving their testimony on deposition, Fauver and Call renewed their motion to dismiss or for summary judgment, arguing with respect to the § 1985 claim that Ryan failed to show any class-based discrimination and with respect to the § 1983 claim that (1) they could not foresee that Ryan would be injured by Scott while in custody; (2) they had no knowledge of the conditions under which Ryan was incarcerated and were not responsible for the day-to-day administration of the county jail; (3) they were free from suit in their official capacities under the eleventh amendment; and (4) they violated no clearly established rights of which reasonable persons in their positions would have known.

On November 9, 1987, the district court dismissed the § 1985 claim, the state law claims and the § 1983 claims premised on the fourth, fifth and eighth amendments. It also dismissed the complaint against Fauver and Call in their official capacities. The court denied

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[5] Ryan also asserted several state law claims, over which the district court exercised pendent jurisdiction.

Fauver and Call's motion on all other grounds. Fauver and Call now appeal the denial of their motion with respect to qualified immunity.

II.

Ryan contends that we lack appellate jurisdiction under *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), because the issues raised by Fauver and Call on appeal are not separable from and collateral to the merits of this case, and resolution of these issues would require review of the record. Development of a record is required in some cases under *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). *Anderson* teaches that cases requiring development of a record do not in every instance fall outside the scope of *Mitchell*.

In *Mitchell*, the Supreme Court held that a district court's denial of a claim of qualified immunity is an appealable "final decision" under 28 U.S.C.A. § 1291 to the extent that it turns on an issue of law, notwithstanding the absence of a final judgment. *Mitchell*, 472 U.S. at 530, 105 S.Ct. at 2817. In *Anderson*, the Court explained that the issue of law in a qualified immunity case is the "objective (albeit fact-specific)" question whether a reasonable official could have believed his actions lawful in light of clearly established law and the information he possessed. *Anderson*, 107 S.Ct. at 3040. Resolution of this fact-specific question may require discovery and the development of a record "tailored specifically to the question of [the official's] qualified immunity." *Id.* at 3042 n. 6. *Mitchell* and *Anderson* are not designed to ease the workload of appellate judges; the necessity of reviewing

a record to determine the propriety of a district court's denial of a qualified immunity claim does not divest an appellate court of its jurisdiction.[6]

We next address Ryan's assertion that we lack jurisdiction because Fauver and Call raise issues that are not appealable. Ryan correctly states that we cannot review issues that pertain to liability on this appeal because the district court's order is "final" only with respect to the collateral issue of qualified immunity. *See Brown v. United States*, 851 F.2d 615, 619 (3d Cir.1988). The flaw in his argument is his apparent assumption that our power of review is dependent upon the proper framing of issues on appeal. We have jurisdiction to review the district court's order under 28 U.S.C.A. § 1291 to the extent that it is final. The court's order is "final" and immediately reviewable under *Mitchell* if Fauver and Call properly raised a claim of qualified immunity in the district court. *See* footnote 6, *supra*. *See Chinchello v. Fenton*, 805 F.2d 126, 130 (3d Cir.1986); *see also Musso v. Hourigan*, 836 F.2d 736, 741 (2d Cir.1988) (appellate review appropriate when district court denies motion for summary judgment without addressing proffered qualified immunity defense). Because they did so, we have jurisdiction to review the

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[6] For the reasons set forth *infra* typescript at 16-21, Fauver and Call failed on this record to show that they are entitled to summary judgment as a matter of law on the issue of qualified immunity. We are not faced on this appeal with the question of whether *Mitchell* gives us appellate jurisdiction over an order denying an official's motion to dismiss for qualified immunity when the record poses genuinely disputed factual issues material to the application of the *Anderson* standard.

district court's order with respect to the question of qualified immunity.[7]

Having resolved these challenges to our jurisdiction, we next examine Ryan's claim that Fauver and Call are improperly attempting to obtain review on appeal of issues beyond the scope of qualified immunity. In support of their challenge to the district court's denial of their qualified immunity claim, Fauver and Call assert that they had no knowledge of the specific conditions alleged to be unlawful or of the dangerous propensities of Scott, that they took no action which violated any clearly established right and that they were entitled to rely on county officials to run the Burlington County Jail in a lawful manner. Ryan characterizes these arguments as a form of "I didn't do it" defense, which we have noted might not be cognizable on appeal from a denial of summary judgment. *See Chinchello,* 805 F.2d at 131.[8]

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[7] We note the tension that exists between the Supreme Court's recent directives on the "merits" of qualified immunity claims and the genesis of its decision in *Mitchell* on the appealability of orders involving qualified immunity claims. *Mitchell* is based on the collateral order rationale set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The issues involved in considering the merits of qualified immunity claims are frequently difficult to separate from the issues involved in the merits of the liability question. The application of *Anderson's* qualified immunity standard is not likely to reduce that entanglement.

[8] In *Chinchello,* we stated:

It well may be that an appellate court lacks jurisdiction to review a denial of a motion for summary judgment when a public official, although he has invoked the doctrine of

(Continued on following page)

As we understand Fauver and Call's arguments, however, they are not merely attempts to show that Fauver and Call did not engage in the alleged violations of Ryan's constitutional rights. They fairly can be described as assertions that (1) Fauver and Call owed Ryan no clearly established duty to take affirmative action to ensure that his constitiutional rights were not violated by

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(Continued from previous page)

> qualified immunity, has attempted to show only that he did not engage in the conduct of which plaintiff complains.

805 F.2d at 131. Since *Chinchello,* we have explained that, although we have jurisdiction to review a denial of summary judgment premised on an "I didn't do it" defense, we will not recognize such a defense if it merely refutes plaintiff's case-in-chief. *See Stoneking v. Bradford Area School Dist.,* 856 F.2d 594, 603-04 (3d Cir.1988); *cf. Brown,* 851 F.2d at 616-17, 620 (distinguishing question of court's appellate jurisdiction and questions appropriate for review).

After *Anderson,* some forms of this defense, beyond the "absence of clearly established duty" argument we recognized in *Chinchello,* may fall within *Mitchell* parameters. We need not and do not decide this issue here. If the actions alleged by plaintiff are not actions that a reasonable official could have believed lawful, *and if defendant claims he took different actions,* which are actions that a reasonable official could have believed lawful, "then discovery may be necessary before [defendant's] motion for summary judgment on qualified immunity grounds can be resolved." 107 S.Ct. at 3042 n. 6. This language demonstrates that raising an "I didn't do [what plaintiff says I did]" defense does not necessarily warrant a denial of summary judgment on the ground that it interjects into the case a material dispute of fact requiring resolution at trial.

others and (2) given the information they had, a reasonable official would not have known he was violating Ryan's constitutional rights.[9] Fauver and Call are entitled to review of these arguments before trial. *See Anderson,* 107 S.Ct. at 3039 & n. 2; *Chinchello,* 805 F.2d at 131-32.

III.

The question before us on the merits of Fauver and Call's qualified immunity claim is whether reasonable officials in their positions, with the information then available to them, should have known that their actions or omissions violated clearly established law. *See Anderson,* 107 S.Ct. at 3040; *Lee v. Mihalich,* 847 F.2d 66 (3d Cir.1988). Our review of the legal questions presented on appeal is plenary. *Brown,* 851 F.2d at 617; *Hynson v. City of Chester,* 827 F.2d 932, 934 (3d Cir.1987), *cert. denied,* ___ U.S. ___, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988).

Ryan alleges that Fauver and Call violated his liberty interest in personal security and freedom from excessive overcrowding by placing state inmates in the Burlington County Jail despite county officials' stated inablility to

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[9] To the extent that these arguments raise issues that go to the merits of Ryan's § 1983 claim, we do not reach them on this appeal. *See infra* typescript at 1206-1207, 1209. We note that the burden of establishing qualified immunity is on the defendant official, but the burden of establishing duty and causation on the merits is on the plaintiff. If an official establishes the former, he escapes trial. If he fails to meet that burden he may still escape liability if the plaintiff fails to meet his burden at trial.

maintain constitutionally adequate conditions in the presence of this added overcrowding. There is substantial support for the district court's determination that the right of a pre-trial detainee to be housed separately from a convicted felon or an inmate known to be dangerous was clearly established in October, 1983. *See, e.g., Youngberg v. Romeo,* 457 U.S. 307, 315, 102 S.Ct. 2452, 2457, 73 L.Ed.2d 28 (1982) (right to personal security is substantive liberty interest); *Bell v. Wolfish,* 441 U.S. 520, 535-36, 99 S.Ct. 1861, 1871-72, 60 L.Ed.2d 447 (1979) (pre-trial detainee's right to be free from punishment prior to an adjudication of guilt); *Stokes v. Delcambre,* 710 F.2d 1120, 1124 (5th Cir.1983) (pre-trial detainee's right to be protected from injury clear since 1979); *Jones v. Diamond,* 636 F.2d 1364 (5th Cir) (en banc) (excessive overcrowding and attendant deterioration in living conditions constitutes punishment of pretrial detainees; confining pretrial detainee indiscriminately with convicted persons is constitutional violation unless necessary to maintain security or physical facilities do not permit their separation), *cert. dismissed,* 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981), *overruled in part on other grounds, International Woodworkers of America Local No. 5-376 v. Champion Int'l Corp.,* 790 F.2d 1174, 1175 (5th Cir.1986) (en banc); *Curtis v. Everette,* 489 F.2d 516 (3d Cir.1973) (prisoner's liberty interest in personal security), *cert. denied,* 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974).

Fauver and Call propose alternative grounds for their immunity from suit. First, they claim that as a matter of law they are immune because they were not responsible for the day-to-day administration of the Burlington County Jail and cannot be held accountable for the

actions of those who were so charged. They also contend that under the circumstances of this case, they lacked sufficient knowledge of conditions at the county jail to have known that their actions violated clearly established law.

While resolution of the question of an official's qualified immunity often turns on whether plaintiff has shown a clearly established right, it may also depend upon the complementary question whether defendant had a clearly established duty towards plaintiff. *See Hynson*, 827 F.2d at 935; *Chinchello*, 805 F.2d at 131-32. Fauver and Call contend that they had no affirmative duty to ensure that Ryan's rights were not violated by others under *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), as explained by this court in *Chinchello*. They also contend that they have no direct authority over county officials, and that county officials alone are responsible for the care, custody and control of inmates in county jails. *See, e.g.*, N.J.Stat. Ann. §§ 30:1-16, :8-17, :8-19, :8-57 (West 1981); *MacNeil v. Klein*, 141 N.J. Super. 394, 358 A.2d 488 (App.Div.), (prison administrators, not county officials, were appropriate codefendants in plaintiffs' civil rights action), *cert. denied*, 72 N.J. 455, 371 A.2d 60 (1976).

In making these arguments, Fauver and Call misread the district court's opinion and ignore the import of Executive Order No. 106, signed by then Governor Byrne in June of 1981. That order acknowledges that penal and correctional institutions in New Jersey are "seriously overcrowded" and that "there is a need to efficiently allocate inmates of state and county penal and correctional institutions to those institutions having available space in order to alleviate overcrowding." App. at 47a. It

declares a state of emergency in these state and county facilities and directs the following:

> 3. I hereby DIRECT that the authority to designate the place of confinement of all inmates confined in all State and County penal or correctional institutions shall be exercised for the duration of this Order by the designee of the Govermor.
>
> 4. I hereby designate the Commissioner of the Department of Corrections to effectuate the provisions of this Order.
>
> 5. The Commissioner may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether owned by the State, a County, or any political subdivision of this State, or any other person, for the confinement of inmates confined in the State and/or County penal of correctional institutions.
>
> 6. When it appears to the satisfaction of the Commissioner that an inmate should be transferred to a penal or correctional institution or facility of the State or the various Counties more appropriate for his needs and welfare, or that of other inmates, or the security of the institution in which he has been confined, he shall be authorized and empowered to designate the place of confinement to which the inmate shall be transferred.
>
> . . . .
>
> 8. I further ORDER that the authority of the Commissioner to designate the place of confinement of any inmate may be exercised when deemed appropriate by the Commissioner regardless of whether said inmate has been sentenced or is being held in pretrial detention except that only persons sentenced to a prison or committed to the custody of the Commissioner may be confined in a State Prison.
>
> 9. The Commissioner of the Department of Corrections shall have full authority to adopt such rules,

> regulations, orders and directives as he shall deem necessary to effect the above provisions.

Id. at 48a-50a. Executive Order No. 106 was held valid by the New Jersey Supreme Court. *Worthington v. Fauver*, 88 N.J. 183, 440 A.2d 1128 (1982). It was continued by Governor Byrne and by Governor Kean through the date of Ryan's injury, October 3, 1983.

The district court acknowledged that Fauver and Call were not explicitly charged with the day-to-day administration of the Burlington County Jail, but held that this did not absolve them of responsibility for county facilities in their implementation of Executive Order No. 106:

> [I]t is absolutely clear that the overriding purpose of Executive Order No. 106 was to create a central authority for all penal institutions in the state. On its face, Executive Order No. 106 referred to the overcrowding problems of both the state and the county facilities and found that "there is a need to efficiently allocate inmates of state and county penal and correctional institutions to those institutions having available space in order to alleviate overcrowding. . . ." To effectuate this goal, Executive Order No. 106 granted Fauver the authority and power to transfer prisoners from county to county, county to state, and state to county. Call, of course, had the authority to set the number of beds.

Ryan v. Burlington County, 674 F.Supp. 464, 480 (D.N.J.1987).

Whether Fauver and Call had a duty towards convicted inmates and pretrial detainees in county facilities under New Jersey law prior to Executive Order No. 106 is irrelevant. Fauver and Call were given authority under Executive Order No. 106 to coordinate housing between state and county facilities and thus to take actions that

affected conditions in county facilities. Having exercised their authority, they had to show that their actions were objectively reasonable. Holding them to that objective standard for immunity purposes does not charge them with day-to-day administration of the Burlington County Jail. We reject their argument that they are immune from suit on this basis.[10]

We therefore return to our original formulation of the question on appeal: whether officials in Fauver's and Call's positions in October, 1983 could reasonably have thought that their actions taken with respect to the Burlington County Jail in the implementation of Executive Order No. 106 were lawful, in light of clearly established law and the information Fauver and Call possessed. We will examine only that information which is relevant to the collateral issue of qualified immunity; disputes over facts that concern liability are not material to our review of the denial of a motion for summary judgment based on claimed qualified immunity. *See Anderson, v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

Fauver and Call do not argue that Ryan's constitutional right to personal security was not clearly established in 1983, nor do they disagree with the district

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[10] As noted by the district court, the actions or omissions of other defendants may provide a basis for a defense to liability. At trial, Fauver and Call are free to contend, as they did before the district court on their motion for summary judgment, that their actions were not the proximate cause of Ryan's injuries.

court's conclusion that the right to personal security includes the right of a pretrial detainee to be housed separately from convicted inmates who are known to be dangerous, unless physical facilities do not permit, their separation. *See* Ryan, 674 F.Supp. at 478.[11] Fauver and Call do contend that they should be immune from suit because they had no knowledge of the specific conditions at the jail alleged to be unlawful or of Scott's alleged dangerous propensities.[12] On this appeal we do not reach the question of Fauver and Call's lack of knowledge regarding Scott and his violent propensities. The issue before us is whether their failure to take steps to institute a system designed to permit the separation of pretrial detainees from felons, given the information they had, defeats their claim of qualified immunity. Their argument that they did not know about Scott's record of violence may be relevant on the issue of whether they caused Ryan's injuries. The district court's order is interlocutory with respect to its denial of summary judgment on the question of causation.

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[11] It may be that there were insufficient physical facilities anywhere in New Jersey's state or local penal institutions to permit such classification consistent with other overriding penalogical concerns. If so, Fauver and Call may raise this as a defense to liability at trial.

[12] The information available to an official is relevant under *Anderson v. Creighton* to the question of whether an official's actions were objectively reasonable. This inquiry into an official's knowledge must not be confused with the factual inquiry relevant on the liability issue of *mens rea*. The official's state of mind is not a factor in determining whether he is immune from suit. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-17, 102 S.Ct. 2727, 2736-38, 73 L.Ed.2d 396 (1982).

Fauver and Call's suggestion that they did not have sufficient information to have known, under the "reasonable official" standard, that their actions would violate Ryan's constitutional rights is not supported by the record. They do not (and could not, on this record) claim to have been unaware of the fact that the county jail was overcrowded. After the issuance of Executive Order No. 106, Call continued to monitor county intake of state-sentenced prisoners and also sat as chairman of the classification committee for the assignment of inmates to county facilities throughout the state. App. at 862a. He communicated with Burlington County Jail personnel on a weekly basis. *Id.* at 859a-60a. When asked what program he developed for the intake of state prisoners at the Burlington County Jail, Call responded:

> A. I based the quotas that I gave to the county on a weekly basis on telephone communications with practically all of the counties, and with my experience and knowledge from our conversations I determined those counties which I felt needed any help, could have been on a special basis such as escape risks or serious offenses, many times medical. We made exceptions for that type but through my conversations I tried to assess the need for all – you know, for the counties and with what I had available, the bed spaces I had available I issued certain quotas until I kept them all filled.
>
> Q. Other than the telephone conversations with people from the county jails and other than knowing what openings there were in the state institutional system did you rely upon any other information or input to decide what quotas you assigned to what counties on any given week?

A. I relied on any information that would have been brought to my attention by any other staff including county services or any staff that may have been in the county jails to perform other functions. If they had information for me I tried to put it all in the mix and tried to evaluate where I felt the need was the most eminent [sic].

Id. at 862a-63a. Call also testified that he knew the Burlington County Jail and others were overcrowded. *Id.* at 865a-66a.

On November 24, 1981, Assistant Burlington County Solicitor Hogan wrote to Fauver regarding the state inmate population at the county jail:

> I am writing to you on behalf of the Board of Chosen Freeholders of the County of Burlington concerning our Jail inmate population at our Grant Street facility in Mount Holly, New Jersey. As you may know, Burlington County is under a Federal Court Order which in part directs that the inmate population be reduced over a period of time to 117 inmates. At the time of the Order, the inmate population was averaging between 125 and 135 inmates and the 117 goal seemed feasible.
>
> Our state prison holdovers at that time were negligible. However, since the entry of the Federal Order, our inmate population has soared to a point that it is running at approximately 170 inmates on an average day. Also state prison holdovers now average 20 to 22 persons of that population.
>
> . . . .
>
> Burlington County is earnestly trying to comply with the Federal Order. I would like to request that the Department of Corrections assist in this task by expediting the removal of state prisoners from our facility. Since the state prison population has risen so drastically in the last month, the potential of a major

> disaster in the prison has also increased. The Burlington County Jail is not a maximum security facility and does not have the proper physical plant to maintain this large number of state inmates.
>
> We are aware of the Governor's executive order and the statewide overcrowding emergency. The Freeholders believe that the Federal Order cannot be ignored however and that the Department of Corrections should do everything possible in conjunction with the efforts of the County to lower this population. By the state expediting the removal of state inmates, there will be considerable relief of our high prison population. . . . It is obvious that the natural result of these efforts will be to alleviate what is fast becoming a dangerous overcrowding situation.

Id. at 275a-76a. Fauver sent Call a copy of his response to Hogan's letter, which acknowledged "the Federal Court Order under which [Burlington County was] operating and your request that we expedite the removal of approximately 22 State-sentenced inmates who are contributing to the overcrowding at the Burlington County Jail." *Id.* at 277a, 869a.[13] Fauver offered assistance "on at least a piecemeal basis." *Id.* at 277a.

Hogan wrote to Fauver on November 23, 1982, again citing the limitations of the county jail's physical plant

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[13] On October 3, 1983, the date on which Ryan was injured, there were 141 inmates housed in the Burlington County Jail; 117 were county inmates and 24 were state-sentenced inmates. *See Ryan*, 674 F.Supp. at 474. During the months of September and October, 1983, Call directed the removal of 8 and 3 state-sentenced inmates, respectively, from the Burlington County Jail. *See* App. at 167a-68a.

and stating that a reduction in the jail population would bring the jail within constitutional standards. *Id.* at 279a-80a. In addition, the County Jail Inspection Reports for the years 1980 through 1983 note various deficiencies in the Burlington County Jail physical plant[14] and state that the limited facilities at the Burlington County Jail preclude the possibility of effective classification with regard to inmate housing assignments. *Id.* at 217a-73a.[15] In litigation to which Fauver was a party, this court indicated that removal of state prisoners would be required as a constitutional remedy if conditions in a county jail which housed state inmates pursuant to Executive Order No. 106 could not otherwise be rendered constitutional. *Union County Jail Inmates v. Di Buono*, 713

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[14] Among the deficiencies enumerated were: (1) the cells were too small; (2) lighting was inadequate; and (3) there was no space for indoor or outdoor recreational activities. The Reports also document deficiencies in services to inmates. For example, there were no educational programs and library services were limited. App. at 217a-31a (1980); 235a-53a (1982); 258a-73a (1983). The report dated February 16, 1983 notes that many of the cells were overcrowded. *Id.* at 260a.

[15] These annual reports were forwarded to Fauver. He testified that he would read the report summations if the report stated that re-inspection was necessary. App. at 731a. Such follow-up inspections were conducted in 1981 and 1982; the cover letter to the 1983 annual inspection states that there would be a follow-up inspection. Fauver's testimony thus shows that he would have read the summaries in the annual reports for the years 1980 (*id.* at 230a-31a), 1982 (*id.* at 251a-53a) and 1983 (*id.* at 272a-73a).

F.2d 984, 1002 (3d Cir.1983), *cert. denied*, 465 U.S. 1102, 104 S.Ct. 1600, 80 L.Ed.2d 130 (1984).[16]

Although the cases cited earlier with respect to the rights of inmates, with the exception of *Union County*, do not involve officials in the precise positions held by Fauver and Call, the standard to which we look in determining the clarity of the constitutional right allegedly violated by an official states that the contours of that right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 107 S.Ct. at 8039. This does not mean, however, that an official will be protected from suit "unless the very action in question has previously been held unlawful;" rather, the unlawfulness must be "apparent" in light of existing law, *Id.* This standard requires "some but not precise factual correspondence" between relevant precedents and the conduct at issue. *People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 189, 144 (3d Cir.1984). "Although officials need

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[16] In *Union County*, inmates of the Union County Jail brought a civil rights action against various judges, administrators of the jail and county officials. The county filed a third-party complaint against Commissioner Fauver. In it, they attributed "any unconstitutionality of conditions at the Jail to overcrowding resulting from the refusal of the Commissioner to accept for custody those prisoners who had been sentenced to state prison." *Union County*, 713 F.2d at 987. This court concluded that Commissioner Fauver's remedial scheme would cure the existing constitutional violations at the county jail and, accordingly, reversed the district court's order directing removal of state prisoners from the county facility. *Id.* at 1002-03.

not 'predic[t] the future course of constitutional law,' they are required to relate established law to analogous factual settings." *Id.* (citations omitted). On this record, the contours of Ryan's rights were clear.

Considering the information available to Fauver and Call, no official of their stature could reasonably have thought that continuing to place state inmates in the Burlington County Jail with no more than an *ad hoc* system for their removal was lawful. Whether Fauver and Call are liable under § 1983 for the injury sustained by Ryan is an issue for trial. At that time, Fauver and Call may raise their claim that they lacked any information about Scott, a question that we cannot resolve on this appeal because it is germane to the merits of Ryan's § 1983 claim rather than the issue of qualified immunity now before us.

IV.

For the foregoing reasons, we will deny Ryan's motion to dismiss this appeal and will affirm the order of the district court denying summary judgment on the grounds of qualified immunity. We will remand this case for further proceedings consistent with this opinion.

Timothy RYAN,

Plaintiff,

v.

BURLINGTON COUNTY, et al,

Defendants.

Civ. A. No. 85-2002.

United States District Court,
D. New Jersey,
Civil Division.

Nov. 9, 1987.

Slimm, Dash and Goldberg by Joseph Goldberg, Westmont, N.J., for plaintiff.

W. Cary Edwards, Atty. Gen. of N.J. by Douglass L. Derry, Deputy Atty. Gen., Trenton, N.J., for defendants William H. Fauver and Joseph G. Call.

Kummer, Knox & Naughton by Stephen R. Knox, Parsippany, N.J., for defendant Michael J. Hogan.

OPINION

BARRY, District Judge.

On October 3, 1983, plaintiff Timothy Ryan was a pretrial detainee in the Burlington County Jail.[1] He was a

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[1] The Complaint alleges that plaintiff was stopped by the Medford Township Police on September 30, 1983 for a motor vehicle violation and was held pursuant to a warrant issued by Mt. Laurel Township arising out of a motor vehicle violation on April 1, 1983.

healthy, fully functioning human being capable of the things human beings take for granted. He could walk, feed himself, go to the bathroom on his own, and make love. On October 4, 1983, Timothy Ryan was rendered quadriplegic. The person who caused this injury, Michael Scott, was Ryan's cellmate and a criminal convicted of a crime involving death or injury to another. On October 4, 1983, Scott was awaiting transfer to a state run facility as a parole violator, and had been waiting for 58 days during which time he was involved in several violent attacks on other inmates.

This tragedy occurred despite a federal consent decree ordering the classification of prisoners as well as the capping of the number of inmates at eight instead of the ten housed in Ryan's cell on October 4, 1983. It occurred despite an Executive Order by the Governor of New Jersey authorizing the Commissioner of the Department of Corrections to take whatever steps he deemed necessary to efficiently allocate inmates of both state and county facilities to relieve the pressures caused by overcrowding.

The moving defendants, as discussed below, are not guilty of wholly disregarding the overcrowding pervasive in the state and county prisons. Indeed, the record is replete with special reports, letters, and memoranda detailing efforts to relieve this problem. Nevertheless, the record convinces me that the conditions at the Burlington County Jail on October 4, 1983 were the product of a system in which no one assumed ultimate authority. The county officials determined that the county was compelled to comply with state requests. The state officials, while overburdening the county prisons with state inmates, did nothing to assure themselves that those

county facilities could handle the overload despite the fact that the same Executive Order which authorized the state officials to use county prisons also entrusted those officials with greater responsibility for those same facilities. And Ryan was gravely injured.

Ryan brings this action pursuant to 42 U.S.C. §§ 1983 and 1985 alleging that numerous defendants, including Burlington County; the Burlington County Board of Chosen Freeholders ("Freeholders"); the Warden of the Burlington County Jail; other prison guards and officials; William H. Fauver, the Commissioner of the Department of Corrections; Joseph G. Call, Deputy Director, Division of Adult Institutions; the Burlington County Solicitor's Office; and Michael J. Hogan, the part-time Solicitor of Burlington County; have violated his constitutional rights under the Fourth, Fifth and Fourteenth Amendments.

On November 13, 1985, defendants Fauver and Call filed a motion to dismiss the complaint and all cross-claims against them or, in the alternative, for summary judgment. On December 13, 1985, I ordered that these defendants be deposed and reserved on the motion pending further discovery. In the interim, defendant Hogan moved for summary judgment. Discovery having now been completed, this opinion resolves both motions.

Essentially, the motions before me raise related questions which may be summarized as follows:

(1) What constitutional rights, if any, did plaintiff enjoy on October 4, 1983 when he was rendered quadriplegic?

(2) Are these defendants immune under *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)?

(3) Is plaintiff's claim actionable under *Davidson v. O'Lone*, 752 F.2d 817 (3d Cir. 1984) (*en banc*), *aff'd sub. nom., Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986) and *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)?

(4) If plaintiff has a claim for a violation of his constitutional rights, was plaintiff's injury proximately caused by the acts of omissions of any of these defendants?

In order to answer these questions, it is necessary to first recount in some detail the facts relating to the administration of state prisons in New Jersey, the history of the Burlington County Jail, and the role of each of these defendants.

The New Jersey Statutory Scheme

New Jersey maintains a parallel system of incarceration. Pursuant to N.J.S.A. 2C:43-10(a), with certain exceptions not relevant here, a person sentenced to a term of one year or more is committed to the custody of the Commissioner of the Department of Corrections. A person sentenced to less than one year is committed "either to the common jail of the county, the county workhouse or the county penitentiary for the term of his sentence and until released in accordance with law." N.J.S.A. 2C:43-10(c). Responsibility for county jails is generally under the control of the county sheriff, N.J.S.A. 30:8-17, 18, unless the County Freeholders resolve to "assume and

thereafter to exercise the custody, rule, keeping and charge of the county jails in their respective counties, and of the prisoners therein. . . ." N.J.S.A. 30:8-19.

Despite this dual system of incarceration, the Commissioner of the Department of Corrections is directed to "[p]romote a unified criminal justice system, including the integration of State and local correctional programs and probation and parole services." N.J.S.A. 30:1B-6(o). Indeed, the declared purpose of the Department of Corrections is "to protect the public and to provide for the custody, care, discipline, training and treatment of persons committed to State correctional institutions or on parole" as well as "to supervise and assist in the treatment and training of persons in local correctional and detention facilities, so that such persons may be prepared for release and reintegration into the community . . . " N.J.S.A. 30:1B-3. The Legislature further declared that "[t]he incarcerated offender should be protected from victimization within the Institution." N.J.S.A. 30:1B-3(c). It is understood that all persons sentenced to a term of imprisonment for a term of one year or more will be placed in the custody of the sheriff of the appropriate county who is obliged by law "within 15 days [to] transport him to the State Prison and there deliver him into the custody of the Commissioner of the Department of Corrections. . . ." N.J.S.A. 2C:43-10(e).

Pursuant to its authority to supervise the county jails, the Department of Corrections in 1979, under the direction of defendant Fauver, promulgated a Manual of Standards for New Jersey Adult County Correctional Facilities. Exhibit P-2 Plaintiff's Appendix in Opposition to Fauver and Call's Motion to Dismiss (the "County

Manual"). *See also* February 26, 1986 Deposition of William H. Fauver at 49. The County Manual "defines the minimum criteria for the various functions and operations of county correctional facilities." *Id.* at 2. It also recites the basis for the Commissioner's authority to create these standards, N.J.S.A. 30:1B-10, which provides:

> All functions, powers, and duties of the Commissioner of Institutions and Agencies and the Department of Institutions and Agencies with respect to all county and city jails or places of detention, county or city workhouses, county penitentiaries, county and municipal schools of detention, privately maintained institutions and non-institutional agencies and juvenile detention facilities for the care, treatment, government, and discipline of inmates are hereby transferred to the Department of Corrections . . . The commissioner may . . . promulgate such rules and regulations as he shall deem necessary to establish minimum standards for such care, treatment, government and discipline.

Of significance to this case is the requirement promulgated by the Department of Corrections and contained in the County Manual that there shall be separate management of inmates distinguishing *inter alia* between pretrial detainees and convicted prisoners and between aggressive inmates and passive/independent inmates. *Id.* at 28. Classification was a goal and obviously important. The design of facilities under construction must accomplish this goal. *Id.* at 2, 6.

Inexplicably, the statutory scheme does not authorize the Commissioner or the Department of Corrections to enforce these regulations. The Department does inspect county facilities, Fauver Dep. at 26, 28, but "*prior* to the executive order [the Department] would have to go to court to enforce any recommendations that we felt were

important enough that should be addressed." *Id.* at 28 (emphasis added).

The Governor's Executive Order

On June 2, 1981, then Governor of New Jersey Brendan T. Byrne signed Executive Order No. 106. This order stated in relevant part:

> WHEREAS, the State Prisons and other penal and correction institutions of the New Jersey Department of Corrections are housing populations of inmates in excess of their capacities and are seriously overcrowded as a result of unusually large numbers of commitments to the State institutions and commitments for terms of years which are longer than heretofore imposed; and
>
> WHEREAS, the Department is physically unable to accept from the Sheriffs of the various counties the custody of inmates sentenced to the custody of the commissioner of the Department of Corrections, as mandated by N.J.S.A. 2C:43-10(e); and
>
> WHEREAS, many county penal institutions of the various counties are also presently overcrowded and are housing inmate populations in excess of their capacities while other county penal institutions have available space for additional inmates; and
>
> WHEREAS, there is a *need to efficiently allocate inmates of state and county penal and correctional institutions to those institutions having available space in order to alleviate overcrowding;* and
>
> WHEREAS, the New Jersey Correctional Master Plan recommended the coordination of resources for jail operation and services by the State, while the jails remain under local jurisdiction; and
>
> WHEREAS, these unusual conditions endanger the safety, welfare and resources of the residents of

this State, and threaten loss to and destruction of property, and are too large in scope to be handled in their entirety by regular operating services of either the counties or the New Jersey Department of Corrections;

NOW, THEREFORE, I, BRENDAN T. BYRNE, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and laws of the State of New Jersey, do hereby DECLARE a state of emergency and ORDER and DIRECT as follows:

1. I DECLARE, that a state of emergency exists in the various State and County penal and correctional facilities by reason of facts and circumstances set forth above.

* * *

3. I hereby DIRECT that the *authority* to designate the place of confinement *of all inmates* confined in *all State and County* penal or correctional institutions shall be exercised for the duration of this Order by the designee of the Governor.

4. I hereby designate the Commissioner of the Department of Corrections to effectuate the provisions of this Order.

5. The Commissioner may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether owned by the State, a County, or any political subdivision of this State, or any other person, *for the confinement of inmates confined in the State and/or County* penal or correctional institutions.

6. When it appears to the *satisfaction of the Commissioner that an inmate should be transferred* to a penal or correctional institution or facility of the *State or the various Counties* more appropriate for his needs and welfare, *or that of other inmates*, or the security of the institution in which he has been confined he shall

be authorized and empowered to designate the place of confinement to which the inmate shall be transferred.

* * *

8. I further ORDER that the *authority* of the Commissioner to *designate the place of confinement* of any inmate may be exercised when deemed appropriate by the Commissioner regardless of *whether said inmate has been sentenced or is being held in pretrial detention* except that only persons sentenced to a prison or committed to the custody of the commissioner may be confined in a State Prison.

9. The *Commissioner* of the Department of Corrections shall have *full authority* to adopt such rules, regulations, orders and directives as he shall deem necessary to effect the above provisions. (emphasis added).

This Executive Order was continued by Governor Byrne and later by Governor Thomas H. Kean and was in effect in October, 1983. July 15, 1983 Executive Order No. 43.

Three days before Governor Byrne issued Executive Order No. 106, a County Executive and the Sheriff of Atlantic County filed an action to compel the Commissioner to accept within 15 days, pursuant to N.J.S.A. 2C:43-10(e), prisoners from Atlantic County who were sentenced to terms of one year or more and, thus, to state institutions. The Appellate Division of the Superior Court of New Jersey held, on September 4, 1981, that Executive Order No. 106 was valid. *Worthington v. Fauver*, 180 N.J.Super. 368, 434 A.2d 1134 (App.Div.1981). The majority emphasized that the case illustrated the need "for centralization of the authority" over both county and state penal institutions to control overcrowding at both

"our county jails and state prisons." *Id.* at 371, 434 A.2d 1134.

Judge Joelson, in dissent, argued that the Executive Order was an improper invasion by the executive into the province of the legislature and that, as implemented by the Commissioner, it was arbitrary, capricious, and unreasonable. "It is not reasonable for state officials to dump their problems on county officials who already have the same or worse problems." *Id.* at 389, 434 A.2d 1134 (Joelson, J., dissenting).

On appeal, the Supreme Court of New Jersey unanimously affirmed. 88 N.J. 188, 440 A.2d 1128 (1982). Noting the problems caused by overcrowding, Justice Pashman stated:

> It is commonly acknowledged that overcrowding in prisons causes grave problems. Rehabilitative programs and recreation become disrupted or non-existent. *As crowding increases, frustration and anger emerge, causing tempers to flare and fights to erupt.* Lack of space makes it difficult if not impossible to segregate prisoners for disciplinary and other purposes. Overcrowding can contribute to riots.

Id. at 188-89, 440 A.2d 1128 (emphasis added).

In finding the Executive Order valid, the Supreme Court noted that the "centralization of power to allocate prisoners among the various state and county facilities is a rational means of alleviating the problem of overcrowding in our prisons." *Id.* at 201, 440 A.2d 1128. What was significant was the apparent understanding of the Supreme Court that Executive Order No. 106 was meant not only to alleviate state overcrowding but also county overcrowding. "The record below demonstrates that *our state and county facilities* may be dangerously close to

producing such a disaster [of substantial loss of property or life]. The prevention of such an occurrence is clearly a proper subject of executive emergency action under the statute." *Id.* at 196, 440 A.2d 1128 (emphasis added). And, in an indirect response to Judge Joelson's argument that Executive Order No. 106 was the dumping of state problem onto the counties, Justice Pashman noted actions taken by the Commissioner to reduce overcrowding at the county jails. *Id.* at 205, 440 A.2d 1128.

Significantly, despite the favorable ruling in *Worthington* and for reasons not provided to this court, in 1982 the Department of Corrections entered into two consent judgments with Essex and Camden counties in suits similar to *Worthington*. In *Essex County Jail Inmates v. Collier*, Civ. No. 82-1945 (D.N.J. Oct. 18, 1982) (Ackerman, J.), the Commissioner agreed to remove three hundred state prisoners housed in Essex County Jail over a two and one half month period and agreed that, after July 1, 1983, any and all state sentenced inmates who caused the Essex County Jail population to exceed 594 would be removed within 15 days. Consent Judgment attached as P-63 to Plaintiff's Appendix Opposing Fauver and Call's Motion to Dismiss. In *Camden County Jail Inmates v. Parker*, Civ. No. 82-1946 (D.N.J. Nov. 18, 1982) (Ackerman, J.), the Commissioner agreed to remove all inmates sentenced to imprisonment in state facilities by removing them from the Camden County Jail within 15 days. This consent judgment also noted that as a result of the overcrowding at Camden County Jail there was no "adequate classification program which insures that inmates are held in the least restrictive circumstances necessary to insure their presence at trial and the maintenance of institutional security . . . *which protects each inmate's right to personal*

security." Consent Judgment at 3 attached as P-64 to Plaintiff's Appendix Opposing Fauver and Call's Motion to Dismiss.

Prior to these consent decrees, on December 3, 1981 a special Governor's Task Force, of which defendant Fauver was a member, issued a Report on Prison Overcrowding. This Report described the then existing situation of overcrowding and noted that the picture became "truly . . . startling" when one considers the fact "that prison officials believe that in order to most efficiently and safely operate prison facilities, they should operate at 92% of operational capacity . . . " and the fact that a rapid rise in the number of state prison inmates was forecasted. Report at 3 attached as P-104 to Plaintiff's Appendix Opposing Fauver and Call's Motion to Dismiss. Moreover, "[t]he prolonged use of total bedspaces within an institution could lead to significant management control problems and increase the potential for serious disruptions." *Id.* at 13.

The Report touched briefly on the particular problem of county facilities. "The county jail overcrowding problem . . . is a direct result of the [state] prison overcrowding situation." *Id.* at 34. Accordingly, one of the issues on which the task force concentrated was ascertaining whether the state facilities met minimum standards "with respect to those awaiting trial, *in terms of the Federal Constitution's Fourteenth Amendment's requirement of due process* . . . " *Id.* at 12 (emphasis added). Continuing, the Report explained:

> From the constitutional perspective, the following factors were considered: (1) *Overcrowding* (sanitation, recreation, space, etc.); (2) Availability of medical treatment; (3) *Protection of the physical safety of*

inmates; (4) Access to the courts–including legal consultation and library access; and (5) Overall prison management.

Id. at 12 (emphasis added).

Finally, prior to making specific recommendations, only one of which directly impacted on county inmates, the Task Force reported that in November, 1981, the state institutions were running at 102% capacity, a percentage which did not include the 960 state inmates being housed in county facilities. At the same time, the county facilities were running at 121% capacity. Had the 960 State holdovers been transferred out of the county facilities, those facilities would have been running at 101% capacity and the state facilities would have been running at 122% capacity.

The Burlington County Jail

As described in a report based on a September 18, 1980 inspection, the Burlington County Jail (the "county jail") is a small two story building located in Mount Holly, New Jersey. Inmates are housed on both floors–the first floor is entirely dormitory housing; the second floor is a mix of dormitory and individual cell housing. *See* Exhibit J in Plaintiff's Appendix Opposing Fauver and Call's Motion to Dismiss. The second floor consists of four maximum security cell blocks and six dormitory cells.

On April 20, 1977, an inmate at the county jail filed a *pro se* civil rights complaint against the Freeholders, the Sheriff and his Chief Deputy. At that time, the Sheriff was the custodian of the jail pursuant to N.J.S.A. 30:8-17, 18. Affidavit of Stephen R. Knox, at ¶12. The complaint

alleged that, on November 13, 1976, fourteen prisoners were housed in cell 208 which contained only nine beds. It further alleged that available on the second floor was bedspace for only 86 inmates, but 105 inmates were housed there. Complaint in *Vespa v. Board of Freeholders of Burlington County*, Civ. No. 77-0765 (D.N.J. April 20, 1977) attached as Exhibit U to Vol. II Exhibits in Support of Knox Affidavit. On March 28, 1978, three other inmates represented by Camden Regional Legal Services, Inc., filed a similar civil rights action. Complaint in *Morrison v. Brenna*, Civ. No. 78-628 (D.N.J. March 28, 1978). These two cases (hereinafter referred to as "*Vespa*") were consolidated before the Honorable Dickinson R. Debevoise. At that time, defendant Hogan was an Assistant County Solicitor and was assigned to oversee the county's defense of these cases.

During the course of the *Vespa* litigation, the Freeholders retained the services of one William Nagle, a corrections expert, to assist in their evaluation of the county jail.[2] Based on Nagle's recommendations, the recommendation of defendant Hogan, and their own knowledge of jail conditions,[3] the Freeholders on January 28,

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[2] Nagle will testify as an expert witness for plaintiff in this action.

[3] The Freeholders' opinion was undoubtedly affected by reports from the Department of Corrections recommending "extensive renovation and/or new construction." October 14, 1980 Letter from Louis J. Scaua to Acting Warden Burlington County Jail attached as Exhibit J to Plaintiff's Appendix in Opposition to Fauver and Call's Motion to Dismiss. *See also* February 6, 1981 Letter from Levin J. Scavo to Acting Warden Burlington County Jail attached as Exhibit P-17 to Plaintiff's Appendix in Opposition to Fauver and Call's Motion to Dismiss.

1987 authorized Hogan to execute a consent judgment on their behalves. Knox Aff. ¶¶17, 18. On January 29, 1981, Hogan and plaintiffs' counsel executed that judgment. *Id.* ¶18. The Sheriff and his deputy refused to sign. *Id.* at ¶19. Plaintiffs filed a motion seeking leave of the court to approve the settlement. On April 27, 1981, the Sheriff and his deputy informed Magistrate John Devine that they would not sign. Magistrate Devine ordered the Freeholders to take control of the jail and then approved the settlement. *Id.*

On May 13, 1981, the Freeholders adopted a resolution assuming jurisdiction, custody, and control of the county jail. Exhibit K to Vol. II of Exhibits to Knox's Aff. This resolution was enacted on the Board's initiative and had been contemplated prior to Magistrate Devine's order. Knox Aff. ¶20. On June 1, 1981, Judge Debevoise vacated Magistrate Devine's order, but, noting the Freeholder's resolution, nevertheless approved the settlement. *Id.* ¶21.

The consent decree approved by Judge Debevoise contained "provisions which the parties agree are necessary to the ends of justice." It did not contain an admission of liability nor an admission of a violation of plaintiffs' constitutional rights. The consent order, however, capped the total number of inmates "except in emergencies" at 117. A maximum of 8 inmates were to be housed in cell 208. Settlement Agreement at 4-5 Attached as Exhibit P-3 to Plaintiff's Appendix in Opposition to Hogan's Motion for Summary Judgment.

Additionally, the consent decree provided that, by June 22, 1983, defendants would renovate the county jail to include "an inmate reception area with a [sic] least

eight (8) individual detention rooms for classification." *Id.* at 4. Within ninety days of the settlement order, defendants agreed that "all inmates shall be reviewed within sixty (60) days of admission to determine their appropriate living area . . . " *Id.* at 17.

In late 1981, the County Jail Warden, the County Prosecutor, defendant Hogan, the Honorable Martin J. Haine, A.J.S.C., and others formed a committee to discuss possible ways to resolve overcrowding at the county jail. Knox Aff. ¶ 27. Plaintiff does not dispute Knox's representation that this committee was strictly advisory and that it was not empowered to effect policy or administer procedure. *Id.* ¶28.

From Burlington County's perspective, it was unfortunate that Executive Order No. 106 was issued the day after the *Vespa* consent decree was signed by the Court. Obviously, the new practice of directing state inmates to be housed at county facilities was at cross-purposes with the *Vespa* consent decree cap of 117 prisoners. On November 24, 1981, defendant Hogan advised defendant Fauver that the county jail was averaging 20 to 22 state holdovers per day. Hogan explained the steps taken by the overcrowding committee to alleviate the problem. He concluded:

> . . . As you can see, Burlington County is earnestly trying to comply with the Federal Order. *I would like to request that the Department of Corrections assist in this task by expediting the removal of state prisoners from our facility.* Since the state prison population has risen so drastically in the last month, the *potential of a major disaster in the prison has also increased. The Burlington County Jail is not a maximum security facility and does not have the proper physical plant to maintain this large number of state inmates.*

> We are aware of the Governor's executive order and the statewide overcrowding emergency. *The Freeholders believe that the Federal Order cannot be ignored however and that the Department of Corrections should do everything possible in conjunction with the efforts of the County to lower this population.* By the state expediting the removal of state inmates, there will be considerable relief of our high prison population, particularly when done in concert with the efforts of Judge Haines and the Board of Freeholders. *It is obvious that the natural result of these efforts will be to alleviate what is fast becoming a dangerous overcrowding situation.*

Attached as P-15 to Plaintiff's Appendix Opposing Hogan's Motion for Summary Judgment (emphasis added).

On December 2, 1981, defendant Fauver responded as follows, copying defendant Call:

> As you already may be aware, the back-up of State-sentenced inmates throughout the county facilities recently reached an all time high of 900, with some counties coping with backups in excess of 80 and 90 State inmates. Concurrently, our State facilities are over capacity, parole rates are declining, and even fewer beds are becoming available as time goes by. While I recognize that Burlington County is not responsible for our problems, and while I fully appreciate the import of the Federal Court Order, I mentioned the foregoing simply to illustrate the magnitude of the problem and the degree to which we must struggle to achieve even a small measure of fairness with respect to assisting all counties.
>
> *Although it is not possible for us to completely eliminate our backup in Burlington, please be assured that we are cognizant of the pressures under which you are operating and that we will continue to try to assist you on at least a piecemeal basis.* You are to be congratulated for the various solutions your committee is considering, and

> I deeply regret that circumstances prevent us from doing more to relieve the problem.

Attached to P-59 of Plaintiff's Appendix Opposing Hogan's Motion for Summary Judgment (emphasis added).

On February 26, 1982, state representatives inspected the county jail and issued a report on March 30, 1982. This report indicated that the average daily population between July 28, 1981 and February 28, 1982 was 156.95, well above the cap of 117. Regarding classification, the Report stated:

> The written plan for classifying inmates is presently under revision. It is recommended to continue the efforts to complete the revision of the written classification plan.
>
> There is no classification manual available at this facility. It is recommended that a classification manual be developed in accordance with the Manual of Standards for New Jersey Adult County Correctional Facilities.
>
> All females are housed in the minimum security facility in New Lisbon.
>
> The limited facilities preclude the possibility of an effective classification system with regard to housing assignments.

February 26, 1982 Report at 5 attached as Exhibit K to Plaintiff's Appendix Opposing Fauver and Call's Motion to Dismiss. The Report recommended that the county jail continue efforts to complete revision of the written classification plan and develop a classification manual in accordance with the manual of Standards referred to above. *Id.* at 12.

On August 12, 1982, the Department of Corrections wrote the Warden of the County Jail noting progress on the recommendations made in February. As to the recommendations regarding classification, it was noted that plans to implement these recommendations were in draft form. August 12, 1982 Letter Attached as P-16 to Plaintiff's Appendix Opposing Fauver and Call's Motion to Dismiss.

On November 23, 1982, Hogan wrote to Fauver requesting waivers of certain standards regarding the renovation of the County Jail pursuant to the *Vespa* consent order. In describing the *Vespa* consent decree, Hogan explained:

> [I]t was the intent of that litigation to substantially improve the physical plant to *constitutional* standards, taking into consideration the existing physical constraints at the County Jail.
>
> * * *
>
> The Order confirms that the issue of square footage was addressed and because of the limited use of those smaller cells as it relates to the larger day space where the inmates spend most of their time, *that a reduction of the population would bring the Burlington County Jail within constitutional standards.*

Exhibit P-11 to Plaintiff's Appendix in Opposition to Fauver and Call's Motion to Dismiss (emphasis added). On December 8, 1982, Fauver wrote Hogan and, after reviewing the county's requests, granted them. Exhibit P-39 to Plaintiff's Appendix in Opposition to Hogan's Motion for Summary Judgment.

The last inspection by state representatives prior to plaintiff's injuries was conducted on February 15, 1983.

This report indicates that, for the period July 15, 1982 until February 15, 1983, the average daily population at the county jail was 147.10. The Report indicates that a written classification plan was currently being revised, but that no classification manual was yet available. Exhibit P-8 at 5 attached to Plaintiff's Appendix Opposing Fauver and Call's Motion to Dismiss. It was again recommended that a classification manual be developed in accordance with the Manual of Standards.

Population reports for the period June 23, 1983 through December 31, 1983 indicate that the county jail exceeded 117 inmates on all but 11 days during that period. Had all state inmates been removed during June and July, the county jail would never have exceeded the limit of 117. Late September and October show some of the highest populations for the entire period.

	County	State	Total
September 15	116	22	138
16	120	22	142
17	123	22	145
18	128	22	150
19	131	19	150
20	133	20	153
21	128	20	148
22	130	20	150
23	134	22	156
24	137	22	159
25	143	22	165
26	133	21	154
27	126	22	148
28	123	22	143
29	125	22	147
30	123	22	145

		County	State	Total
October	1	128	23	151
	2	130	23	153
	3	117	24	141
	4	123	24	147
	5	120	23	133
	6	120	18	128
	7	117	18	135

During this period of time, defendant Call was in touch with representatives of each county in New Jersey to determine quotas for the various counties. Deposition of Joseph Call at 165-66. Call testified that he tried to make allowances for special circumstances. *Id.* at 166, 177, 179. While he had no knowledge of any particularly aggravating circumstances in Burlington County, *id.* at 168-169, 184, he had never been inside the Burlington County Jail, *id.* at 161-62, and had no knowledge of what classification procedure was in effect at the county jail. *Id.* at 220. Regarding defendant Fauver's offer to help Burlington County on at least a piecemeal basis, Call stated that he " . . . would have evaluated this request from the commissioner as to if the opportunity availed itself to try and give Burlington County some relief in terms of their backup." *Id.* at 197. Call admitted that by 1983 he was aware of the consent order and "could assume they probably were over[crowded]. They were all overcrowded and I had to assume Burlington was overcrowded." *Id.* at 175.

Timothy Cooper was the Burlington County official who spoke with Call on a weekly basis. Cooper testified, however, that when he spoke to Call, Call gave him a number of beds, if anything was available:

> Sometimes that number of beds would have a stipulation with it, meaning prison sentences only, indeterminants only, depending on the availability of beds in what facility at the state, and in the case of a parole violator, again, depending on where he had been paroled from whether or not there was any availability.

Deposition of Timothy Cooper at 79 attached as Exhibit A to Plaintiff's Appendix in Opposition to Fauver and Call's Motion to Dismiss. From Cooper's perspective, there was very little bargaining with Call.

> Q. What would the nature of your conversation have been with Mr. Call?
>
> A. Something along the lines of, you know, I have 40 here, Joe, that's about a third of my population and, you, know, I really have to move some, anything. Pretty much pleading I guess.

Id. at 87. Cooper also recalled discussing the *Vespa* consent decree with Call.

> We discussed on occasion I remember the fact that there were certain counties who had been ordered by the courts that the State had to accept their state prisoners after 15 days, and *this was part of the reason why the number of allocations to Burlington had been cut back to accommodate the five or six counties who they were forced to accept whatever number they had.*
>
> . . . part of those discussions would have included our Consent Decree which, *of course, the state was not obligated to pay any attention to. . . .*

Id. at 89 (emphasis added).

Fauver testified that overcrowding can cause problems in housing, mess halls, visiting areas, and with security. *Id.* at 60. Specifically, "there can be fights among inmates." *Id.* at 62. While stressing that these things can

happen even without overcrowding, Fauver admitted that they "were valid concerns." *Id.* at 66. Fauver kept current on the numbers on inmates in the county jails but relied on the inspection reports to ascertain the conditions of these facilities. *Id.* at 31, 32. Fauver normally read the summations in these reports but only after there had been reinspections. *Id.* at 34. Generally, Fauver expected to be informed of "serious violations" if they were not corrected by subsequent inspection. *Id.* at 107.

As to Burlington County, despite his assurance to Hogan in December, 1981 that the Department of Corrections was "cognizant of the pressures under which [the County was operating]," Fauver had little if any knowledge. He did not know that there were no recreational facilities there, did not know inmates slept on mattresses on floors, and did not know that all meals were eaten in the cell in which an inmate lived. *Id.* at 114.

Numerous other persons connected with the county jail provided deposition testimony. The Warden of the county jail in 1983 and a defendant in the instant case, testified that as of October, 1983, none of the terms of the *Vespa* consent decree as to heating, ventilation, electrical system, contact visits, day room space, exercise facility requirements, or classification had been complied with. Deposition of John Bradman at 32 attached as Exhibit C to Plaintiff's Appendix in Opposition to Fauver and Call's Motion to Dismiss. Without tarrying to detail this testimony, it appears undisputed that as of October, 1983, the conditions at the Burlington County Jail were little improved, if at all, over the conditions which existed at the time of the *Vespa* consent decree.

Subsequent to the filing of the *Vespa* action, Hogan was intimately involved in attempting to resolve the problems in the county jail. He was also aware, no later than June 21, 1982, that other counties had sued the state and obtained federal court orders directing the Department of Corrections to remove all state sentenced inmates within fifteen days. *See* Letter of June 21, 1982 to Hogan attached as Exhibit P-112 to Plaintiff's Appendix Opposing Hogan's Motion for Summary Judgment. Eventually, in 1985, at Hogan's suggestion, Burlington County sued Governor Kean and Commissioner Fauver and entered into a similar order, an order that came too late to protect Ryan. *See Consent Order* in *Board of Chosen Freeholders of Burlington County v. Kean*, L-14930-85 (Law Div. March 13, 1985) attached as Exhibit 1 to Plaintiff's Appendix in Opposition to Fauver and Call's Motion to Dismiss.

The Complaint

As noted earlier, plaintiff brings this action under 42 U.S.C. § 1983, claiming that his fourth, fifth, and fourteenth amendment rights have been violated. Additionally, plaintiff alleges a violation of § 1985(3) and pendent claims sounding in tort.[4]

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[4] While neither party has addressed this issue, I note in passing that it is almost a certainty that plaintiff's pendent claims are barred against any of the named defendants. N.J.S.A. 59:5-2(b)(4) states emphatically that "[n]either a public entity nor a public employee is liable for any injury caused by a prisoner to another prisoner." Whether plaintiff will have his day in court thus depends completely on whether he may maintain his § 1983 claim alleging violations of his constitutional rights.

This case first came before the court in September, 1985, when the Solicitor's Office and defendant Hogan moved for dismissal arguing that Hogan merely effectuated or implemented the Freeholder's decisions and had no control or supervisory power over their actions. On November 14, 1985, I issued an opinion and order explaining:

> At oral argument I was inclined to grant defendants' motion but plaintiff's attorney, Mr. Goldberg, argued that Hogan and the Solicitor's office may be proper defendants regardless of their perception of their duties if it could be shown that such a duty existed by virtue of the consent decree itself and that Hogan and the Solicitor's office knew that there was an ongoing wrong. . . . I reserved on the motion to consider the issues involved more closely.

Opinion at 3. While that motion was under advisement, plaintiff conducted discovery which clearly created an issue as to whether Hogan was a mere functionary. I, therefore, denied the motion without deciding the legal issue raised. Hogan now renews his motion on both similar and new grounds, including the ground of qualified immunity.

On December 16, 1985, I heard argument on Fauver and Call's Motion for Summary Judgment based on eleventh amendment immunity[5] and qualified immunity. On December 23, 1985, I ordered that Fauver and Call

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[5] Plaintiff conceded in December, 1985 that the eleventh amendment bars suit against Fauver and Call in their official

(Continued on following page)

be deposed in the hope that resolution of the qualified immunity issue would become clearer than it was at that time.

To defeat the pending motions for summary judgment, which go beyond the issue of qualified immunity, plaintiff must come forward with facts from which a reasonable jury could conclude in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). This issue of qualified immunity is an issue for the court. With specific reference to qualified immunity, the court must determine the objective legal reasonableness of the defendants' actions assessed in light of the legal rules that were clearly established at the time these actions were taken. *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 8084, 97 L.Ed.2d 523 (1987).

Plaintiff's Constitutional Rights

42 U.S.C. § 1983 provides redress only for infringements of rights "secured by the Constitution and laws of

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(Continued from previous page)

capacities. However, "to establish personal liability in a § 1983 action it is enough to show that the official, acting under color of state law, caused the deprivation of state law or caused the deprivation of a federal right." *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 3106, 87 L.Ed.2d 114 (1985) (cite omitted). The fact that any judgment against these defendants in their individual capacities will be paid by the state does not cloak them with eleventh amendment immunity. *Demery v. Kupperman*, 735 F.2d 1139, 1147-49 (9th Cir. 1984), *cert denied*, 469 U.S. 1127, 105 S.Ct. 810, 83 L.Ed.2d 803 (1985). Thus, while Fauver and Call will be dismissed in their official capacities, they may still be subject to personal liability absent qualified immunity.

the United States." *Davidson v. O'Lone*, 752 F.2d 817, 821 (3d Cir.1984) (*en banc*), *aff'd sub. nom., Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986). A threshold requirement in virtually every § 1983 action is the identification of which constitutional right a plaintiff seeks to vindicate.

Plaintiff's complaint relies on the fourth, fifth, and fourteenth amendments. Additionally, in some of plaintiff's supporting papers, reference is made to the eighth amendment. Plaintiff has not pressed either his fourth or fifth amendment claims. Additionally, it is beyond dispute that the eighth amendment does not apply to pretrial detainees. *Robinson v. City of Mount Vernon*, 654 F.Supp. 170, 172 (S.D.N.Y.1987) *citing Bell v. Wolfish*, 441 U.S. 520, 535 n. 16, 99 S.Ct. 1861, 1872 n. 16, 60 L.Ed.2d 447 (1979); *Ingraham v. Wright*, 430 U.S. 651, 671 n.40, 97 S.Ct. 1401, 1412 n. 40, 51 L.Ed.2d 711 (1977). Accordingly, if any of plaintiff's constitutional rights were implicated in this case, they must have arisen under the fourteenth amendment which states, in part, "nor shall any state deprive any person of life, liberty, or property, without due process of law."

The rights of pretrial detainees were discussed in detail by the Supreme Court in *Bell v. Wolfish, supra. Bell* held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535, 99 S.Ct. at 1872. The determination as to whether a particular practice or restriction constitutes punishment in the constitutional sense depends on whether that practice or restriction is rationally related to a legitimate nonpunitive government purpose and whether that practice or

restriction appears excessive in relation to that purpose. *Id.* at 538-39, 99 S.Ct. at 1873-74. And while pretrial detainees may not bring an eighth amendment claim, *Bell* makes clear that "pretrial detainees who have not been convicted of any crime retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." *Id.* at 545, 99 S.Ct. at 1877. Thus, Ryan enjoyed two tiers of rights on October 4, 1983 while detained at the county jail: he was entitled to the rights granted convicted persons as well as the right to be free of any practice or restriction placed on him as punishment.

In *Davidson, supra,* 752 F.2d at 821-22, the Court of Appeals for the Third Circuit held that a prisoner has a liberty interest in personal security under the fourteenth amendment. The State of New Jersey appears to concede that this holding is correct. *See* Report on Prison Overcrowding at 12 quoted *ante* at 11-12.

It is equally clear that overcrowding can rise to such a level as to violate a prisoner's or pretrial detainee's constitutional rights. *Union County Jail Inmates v. DiBuono,* 713 F.2d 984, 992 (3d Cir.1983), *cert. denied,* 465 U.S. 1102, 104 S.Ct. 1600, 80 L.Ed.2d 130 (1984), *citing Bell, supra,* 441 U.S. at 542, 99 S.Ct. at 1875. *See also* Report on Prison Overcrowding, *supra.* Whether overcrowding rises to such a level, however, requires a determination "as to whether these conditions 'cause [inmates] to endure [such] genuine privations and hardship over an extended period of time,' that the adverse conditions become excessive in relation to the purposes assigned for them." *DiBuono, supra,* 713 F.2d at 992.

In *Union County,* the Honorable Harold A. Ackerman adopted the findings of the Hon. Worrall F. Mountain, a former Justice of the Supreme Court of New Jersey serving as special master, that each of six specific conditions emanating from overcrowding, as applied to pretrial detainees constituted punishment. 713 F.2d at 993-94 and n. 11. The Third Circuit tacitly concluded that, under the totality of the circumstances, as to pretrial detainees, overcrowding at the Union County Jail would amount to punishment. *Id.* at 996. However, because the court found that the remedial scheme put forth by the Commissioner would effectively cure all of the conditions that were of particular concern to the Special Master, conditions at the jail would pass constitutional muster when the proposals were implemented.

In the present case, there is ample evidence which, if accepted, would lead to the conclusion that, as to Ryan, the conditions at Burlington County Jail constituted punishment and, as in *Union County,* were excessive to the purposes assigned for them. The Warden of the County Jail admitted in his deposition that, as of October, 1983, all of the conditions described by Justice Mountain existed at the Burlington County Jail. Deposition of John Bradman at 32 attached as Exhibit C to Plaintiff's Appendix in Opposition to Fauver and Call's Motion to Dismiss. Viewing the facts in the light most favorable to plaintiff, I conclude that his constitutional rights were violated in this regard.

Plaintiff has also suggested that there is a constitutional right to a classification system by which new inmates are assigned appropriate living accommodations. The Fifth Circuit has held that *"the confinement of pretrial*

detainees indiscriminately with convicted persons is unconstitutional unless such a practice is 'reasonably related to the institution's interest in maintaining jail security' or physical facilities do not permit their separation." Jones v. Diamond, 636 F.2d 1364, 1374 (5th Cir.) *(en banc), cert. denied,* 453 U.S. 911, 101 S.Ct. 3141, 69 L.Ed.2d 993 (1981) (emphasis added). In *Riley v. Jeffes,* 777 F.2d 143, 145 (3d Cir.1985), the Third Circuit quoted *Jones, supra,* for the proposition that "when prison officials have failed to control or separate prisoners who endanger the physical safety of other prisoners and the level of violence becomes so high . . . it constitutes cruel and unusual punishment."

Some courts have found a constitutional right to a reasonable classification system in a local jail. *See, e.g., Campbell v. McGruder,* 580 F.2d 521, 546-48, 565-70 (D.C.Cir.1978), *aff'g in part,* 416 F.Supp. 100, 105 (D.D.C.1975); *Jones v. Metzger,* 456 F.2d 854 (6th Cir.1972), *aff'g,* 323 F.Supp. 93 (N.D.Ohio 1971); *Jones v. Wittenberg,* 330 F.Supp. 707, 717 (N.D.Ohio 1971); *Barnes v. Government of Virgin Islands,* 415 F.Supp. 1218, 1235 (D.V.I. 1976); *Rhem v. Malcolm,* 371 F.Supp. 594, 617-20 (S.D.N.Y.), *aff'd and remanded,* 507 F.2d 333, 339-40 (2d Cir.1974), on *remand* 389 F.Supp. 964, 968 (S.D.N.Y.1975), *amended,* 396 F.Supp. 1195, 1201-02 (S.D.N.Y.1975), *aff'd,* 527 F.2d 1041 (2d Cir. 1975). In *Bell v. Wolfish,* the trial court granted pretrial detainees relief on their classification claim finding that pretrial detainees were entitled to be "protected from physical and mental injury." 439 F.Supp. 114, 125-28 (S.D.N.Y.1977). That ruling was not appealed at least to the Supreme Court and to date this issue has never been squarely addressed by that court. *See Bell v. Wolfish, supra,* 441 U.S. at 529 n. 10, 99 S.Ct. at 1868 n. 10.

Congress did not believe that pretrial detainees have an *absolute* constitutional right to housing separate from convicted inmates for, in the Bail Reform Act of 1984, it stated that when denying bail, a detention order

> shall direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held custody pending appeals.

18 U.S.C. § 3142(i)(2). While it is, of course, ultimately for the courts to decide if such a right exists, I find it relevant to consider Congress' opinion.

I conclude that pretrial detainees have a constitutional right to be housed separately from known dangerous convicted inmates who pose a threat to their personal security unless physical facilities do not permit their separation.[6] Applying this standard to the instant case, I conclude that plaintiff has alleged a constitutional right which may or may not have been violated.

There is a factual dispute in the record as to whether the physical facilities in 1983 allowed for classification. The State Inspection Reports of Burlington County Jail consistently stated that "The limited facilities at the main jail preclude the possibility of an effective classification

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[6] I have not ignored the first part of the Fifth Circuit's test in *Jones* – "reasonably related to the Institutions's interest in maintaining jail security" – obviously derived from *Bell*. However, confining a pretrial detainee with a known dangerous convicted inmate could never be *per se* reasonably related to maintaining jail security.

system with regard to housing assignments." Additionally, there was some deposition testimony supporting that conclusion. Deposition of Captain Edgar H. Pierce at 44-45 attached as Exhibit B to Plaintiff's Appendix Opposing Fauver and Call's Motion to Dismiss.

There is, however, evidence from which a jury could conclude that classification was possible in 1983. First the fact that the *Vespa* consent decree called for classification at the county jail within sixty days suggests that in 1981 classification was considered possible. Second, the record is clear that, even on days in 1983 when overcrowding was minimal or non-existent, there was no attempt to classify inmates. This supports an inference that the lack of classification was a result of reasons other than overcrowding. Finally, there is presently a classification system used in Burlington County and plaintiff's expert John Case testified that a similar system could have been used in 1983. September 8, 1986 Expert Report at 5. Accordingly, if plaintiff can prove at trial that classification was feasible at the Burlington County Jail in 1983, he will have proved a constitutional violation.

Qualified Immunity

Defendants Fauver, Call and Hogan argue that, as a matter of law, they are protected by qualified immunity and that the court should find in their favor on this issue now. In *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), the Supreme Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known." In *Skevofilax v. Quigley,* 586 F.Supp. 532 (D.N.J.1984), I had occasion to explain that under *Harlow,* the question of qualified immunity is "ordinarily wholly one of law, to be decided by the court before the commencement of trial." 586 F.Supp. at 535. I also explained that the issue in such a determination "is almost invariably one of determining whether, as an objective matter, the defendant reasonably should have known the law under which his conduct is being assessed. . . .[t]he inquiry reduces to a determination as to whether the law with respect to the conduct in question is settled or unsettled. . . ." 586 F.Supp. at 538-39.

Recently, *Anderson v. Creighton,* ___ U.S. ___, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), restated the *Harlow* standard at 3038, as follows: "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken. . . ." The majority of the court, speaking through Justice Scalia, reiterated what it had recently stated in *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986): that application of this standard would accord the protection of qualified immunity to "all but the plainly incompetent or those who knowingly violate the law" and described *Harlow* as a "guarantee of immunity." *Anderson v. Creighton,* 107 S.Ct. at 3038-39.

Justice Scalia explained that "[t]he contours of the right must be sufficiently clear that a reasonable official

would understand that what he is doing violates that right." *Id.* at 8039. Here, the "contours" of the rights plaintiff enjoyed were "sufficiently clear" to be deemed "clearly established" within the meaning of *Harlow.* Indeed, plaintiff's constitutional rights to physical security and protection from overcrowding were explicitly recognized by the State of New Jersey in 1981 in the Report on Prison Overcrowding prepared in part by Fauver, Certainly, *Bell v. Wolfish* was decided long before 1983 and addressed these very issues. While plaintiff's right to classification was not characterized in the 1981 Report as "constitutional right," the County Manual emphasized the importance of classification as did the *Vespa* consent decree. And, in *Harlow* terms, while there were no pre-1983 Third Circuit cases explicitly recognizing classification to be a constitutional right, there was a large body of caselaw elsewhere which did so. *See ante* at 477-78.

But finding that the legal rules in effect when defendants' actions were taken were "clearly established" does not, of course, end the inquiry. The determination must also be made as to whether, as an objective matter, a reasonable public official would understand at the time he acted that what he was doing violated those clearly established rules. Even if a public official mistakenly concludes that what he or she is doing is lawful, as long as the official reasonably believes that his or her conduct was lawful, the official should not be held personally liable. *Id.* at 3039. Stated somewhat differently, "the relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer would have believed [the defendants' conduct] to be lawful, in light

of clearly established law and the information the [defendants] possessed. The defendants' subjective beliefs [about that conduct] are irrelevant." *Id.* at 3040.

Parenthetically, it was heartening to be reminded in *Anderson* that the Court has been unwilling to complicate what it believes to be the uncomplicated qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties. *Id.* Yet the thrust of defendant Hogan's argument to me is that he had no power over and thus, presumably no duty to the Burlington County Jail and as a result, could not correct unconstitutional conditions therein. Defendants Fauver and Call argue that they were not charged with the day to day administration of the Burlington County Jail.

Were I required on this motion to reach this issue, I would be compelled to say that as to defendant Hogan the resolution thereof is fact dependent with the facts disputed and resolution of these facts intertwined with questions of credibility. The fact that there is no written by-law or resolution granting Hogan power over the jail or charging him with a duty to the jail is not dispositive for, as Hogan himself noted, in county positions such as his there is no bright line dividing those who decide and those who follow through on these decisions. The reality is that by-laws and resolutions aside, it is force of personality and personal charisma which determine how much unfettered power a particular county Solicitor enjoys. Stated somewhat differently, were the issue before me to turn on whether Hogan was a Player with a capital "P" or a mere functionary, I would have to conclude that that would be a factual question for the jury with the court,

upon the jury's answers to interrogatories, reserving its right to then rule on the issue of qualified immunity.

Turning to Fauver and Call, it is quite true that they were not explicitly charged with the day to day administration of the Burlington County Jail. But it is absolutely clear that the overriding purpose of Executive Order No. 106 was to create a central authority for all penal institutions in the state. On its face, Executive Order No. 106 referred to the overcrowding problems of both the state and the county facilities and found that "there is a need to efficiently allocate inmates of state and county penal and correctional institutions to those institutions having available space in order to alleviate overcrowding. . . ." To effectuate this goal, Executive Order No. 106 granted Fauver the authority and power to transfer prisoners from county to county, county to state, and state to county. Call, of course, had the authority to set the number of beds. And, most importantly, Fauver was explicitly given authority "to designate the place of any inmate . . . when deemed appropriate by the Commissioner regardless of whether such inmate has been sentenced or is *being held in pretrial detention*. . . ." (emphasis added).

Centralization of power was the cornerstone of the Supreme Court of New Jersey's refusal to strike down Executive Order No. 106. *Worthington, supra,* 88 N.J. at 196, 201, 440 A.2d 1128. And, as noted before, it was the reason why the Supreme Court rejected Judge Joelson's biting criticism that the order was just another way "for state officials to dump their problems on county officials

who already have the same or worse problems." *Worthington, supra,* 180 N.J.Super. at 389, 434 A.2d 1134 (Joelson, J., dissenting).

Despite the clear language of Executive Order No. 106 and its interpretation by the Supreme Court of New Jersey, the record indicates that Fauver and Call acted primarily to protect state interests. Perhaps the most significant statistic in the Report on Overcrowding is that the state facilities in November, 1983 were operating at 102% of capacity while the county facilities, including the 960 state inmates housed there, were operating at 121% of capacity. Had those 960 state inmates been removed from county to state facilities the figures would have been almost exactly the opposite with, one would imagine, litigation such as is now before me emanating from state, rather than county, facilities.

I do not suggest that the problem of overflow and overcrowding was easily susceptible or even susceptible of resolution given the limited space in state and county facilities. But when the state official given the authority to make the decision to place the overflow of state inmates in county facilities and the state official who decided how many extra inmates would be put in each jail argue they had no responsibility for those county facilities on a day to day basis, it can only be concluded, albeit sadly, that Judge Joelson was correct all along. It is clear to this court that while prior to Executive Order No. 106 Fauver's authority was merely supervisory, after Executive Order No. 106 Fauver's authority extended as far as necessary to implement the goals set forth therein. Having decided to use county facilities to house state

inmates, Fauver assumed responsibility for those county facilities. Similar reasoning applies to defendant Call.

Be that as it may, lack of power and lack of duty are clearly defenses to liability. But, equally as clearly, "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability, and . . . is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985) (emphasis in original).

We return to where we began – the *Anderson* test: should reasonable officials, acting in the capacities of these defendants, have understood that their actions violated what I have found to be clearly established rules? More specifically, could defendants have believed their actions to be lawful in light of those rules and the information they possessed.

Without belaboring what has already been belabored, the answer as to defendants Fauver and Call is clearly "No," and their description of their conduct as an attempt to be "as fair and equitable as possible in the allocation of inmates," Br. at 30, even if true, is "irrelevant," as *Anderson* put it. While the jury may well find that the acts of Fauver and Call were not a proximate cause of plaintiff's injuries, those same acts mandate that Fauver and Call's motion for summary judgment on the ground of qualified immunity be denied.

Defendant Hogan's motion will be granted. Hogan understood the constitutional dimensions of the problems at the Burlington County Jail and, whether player or functionary, the record reveals Hogan's continued efforts to alleviate these problems, not to ignore them or place

them on the back burner. In his letter to Fauver of November, 1981, he warned that there was a potential for a "major disaster" at the Burlington County Jail. Viewed objectively, Hogan's hands at that point were tied and it was reasonable for him to accept Fauver's offer of at least a piecemeal solution and hope, perhaps, for complete relief without the necessity for filing suit as other counties had done.

The Daniels & Davidson Issue

Defendant Hogan argues that the complaint should be dismissed because the evidence as to him shows nothing more than negligent misconduct and, thus, as a matter of law, he cannot be held liable. Given my disposition on qualified immunity as to defendant Hogan, I need not reach this issue but note that the determination he would have me make is more properly made by the jury. Defendants Fauver and Call argue for dismissal because the allegations that they were deliberately indifferent and grossly negligent fail to state a claim under § 1983. This argument is unavailing.

In *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), the Supreme Court held that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of our injury to life, liberty, or property." 106 S.Ct. at 663. However, neither *Daniels* nor *Davidson* decided the issue of whether "recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." *Daniels*, 106 S.Ct. at 667 n. 3. *See also* 106 S.Ct.

668, 672-75 (Blackmun, J., concurring in *Daniels* and dissenting in *Davidson*).

Absent Supreme Court precedent, this court is bound by the decision of the Third Circuit. In *Davidson*, Judge Sloviter, writing for the majority of the Third Circuit sitting *en banc*, held that "actions may be brought in federal court under § 1983 when there has been infringement of a liberty interest by intentional conduct, *gross negligence or reckless indifference, or an established state procedure.*" 752 F.2d at 828 (emphasis added). While Judges Weis and Garth did not join in the reference to gross negligence, 752 F.2d at 828 n. 8, it is fair to assume that the three dissenting judges who found mere negligence to be enough to state a claim under § 1983 would agree with that aspect of the holding. *See Hicks v. Feeney*, 770 F.2d 375, 378 (3d Cir.1985). Certainly, district courts within this circuit have assumed that gross negligence is sufficient to state a claim under § 1983. *See, e.g., Heine v. Connelly*, 644 F.Supp. 1508, 1513 n. 5 (D.Del.1986) (Longobardi, J.); *Kempski v. Ellingsworth*, 638 F.Supp. 685 (D.Del.1986) (Roth, J.).

Plaintiff alleges that defendants were deliberately indifferent to and grossly negligent concerning the above listed constitutional violations. Complaint, ¶¶63-71. There is evidence in this record which would enable a jury to find that the conduct of Fauver and Call constituted deliberate indifference and/or gross negligence. Moreover, plaintiff's incarceration in an overcrowded cell with a state prisoner may be characterized under Executive Order No. 106 as a formalized state procedure. I, therefore, conclude that plaintiff's cause of action is not barred by *Daniels* and *Davidson*.

The Question of Causation

Defendants Fauver and Call, relying on *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980), move to dismiss on the ground that it was not foreseeable to them that Ryan would be injured by Scott while in custody. Defendant Hogan argues that under the doctrine enunciated in *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), he should be dismissed because plaintiff can establish no affirmative link between his injuries and Hogan's conduct. I deal with these arguments together because they both revolve around the question of proximate cause: what did these defendants do which caused plaintiff's injuries. I note in passing that plaintiff has the right to appeal the qualified immunity decision as to defendant Hogan and in the event my decision is reversed, this issue would then have to be addressed. I address it now.

The Third Circuit recently summarized the *Rizzo* holding as follows:

> In *Rizzo v. Goode*, 423 U.S. 362 [96 S.Ct. 598, 46 L.Ed.2d 561] (1976), the Supreme Court addressed and rejected the argument that a supervising public official has an affirmative constitutional duty to supervise and discipline so as to prevent violations of constitutional rights by his or her subordinates. It held that even where a pattern of constitutional violations by subordinates is shown, supervising officials do not violate the constitutional rights of the victims of such misconduct unless they have played an "affirmative part" in that misconduct.

Chinchello v. Fenton, 805 F.2d 126, 133 (3d Cir.1986). As explained by another district judge within this circuit,

"[i]n order to establish an 'affirmative link' the Third Circuit has required an examination of the extent to which the individual 'participated in a pattern of violation by virtue of knowledge, acquiescence, support, and encouragement.' " *Gann v. Schramm*, 606 F.Supp. 1442, 1451 (D.Del.1985) *quoting Black v. Stephens*, 662 F.2d 181, 189 (3d Cir.1981), *cert. denied*, 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982).

To understand how the *Rizzo* standard has been applied in this circuit, it is instructive to compare the facts of *Chinchello* and *Black*. In *Black*, the plaintiff alleged he was involved in a dispute provoked by an Allentown off-duty detective, Stephens. As a result of this incident, plaintiff alleged that Stephens, relying on a police regulation enacted by the Chief of Police which precluded investigations into complaints of police misconduct until after adjudication of any charges against the complainant brought in connection with the alleged misconduct, filed charges against plaintiff in an effort to delay an investigation into Stephens' conduct.

Plaintiff alleged, and the jury found, that the Chief of Police was liable under *Rizzo* because his promulgation of this policy proximately caused Stephens to file unwarranted charges against plaintiff. On appeal, a panel of the Third Circuit in a divided decision found that the Chief of Police's promulgation satisfied the affirmative link standard of *Rizzo*, 662 F.2d at 189-90. Specifically, the court found it significant that, viewing the facts most favorably to plaintiff, the jury could have concluded that Stephens filed additional charges after being informed that plaintiff had complained to the Chief of Police. These additional charges, the Third Circuit held, could have

been viewed as a means of delaying further any hearing, 662 F.2d at 190 n. 8. Judge Garth, in dissent, noted that this evidence was, indeed, weak and criticized the majority for finding on that record that the Chief of Police had participated in a pattern of violation by virtue of support and encouragement, 662 F.2d at 197 (Garth, J. dissenting).

The facts of *Chinchello*, relied on extensively by Hogan, are much different. Plaintiff, a federal inmate, alleged that his outgoing mail had been opened and that he had been placed in administrative detention in violation of his constitutional rights. One of the defendants, Carlson, was the Director of the Bureau of Prisons against whom plaintiff claimed as follows:

> [A] failure to train, supervise or discipline subordinates may be sufficient ground to hold supervisory personnel liable where the supervisor knew or should have known of existing harmful conditions, practices, or lack of procedures that exist within the system he supervises which are substantially likely to violate plaintiff's rights, that such knowledge or lack of knowledge may constitute an implicit acquiescence in, or approval of, employee conduct that ultimately violated plaintiff's rights.

805 F.2d at 132. The Third Circuit emphasized that plaintiff "pointed to no behavior which could have given [any other defendant] the impression that Carlson had approved the kind of conduct of which [plaintiff] complains." *Id.* In holding that the claims against Carlson should be dismissed the *Chinchello* court emphasized that *Rizzo* requires more than inaction or insensitivity and reaffirmed that public officials have "no affirmative constitutional duty to train, supervise or discipline so as to prevent [constitutional torts]." *Id.* at 133.

The case at bar is more closely analogous to *Black* than to *Chinchello*. Plaintiff is not complaining that Fauver and Call failed to train county officials or failed to act in some other amorphous way. Rather, plaintiff claims that Fauver and Call made an affirmative decision as to how Executive Order No. 106 should be implemented. Fauver, as Commissioner of the Department of Corrections, directed that state prisoners be held over in county jails, thus purposefully deciding to shift the burden of overcrowding from state to county facilities. When made aware of the potentially dangerous conditions at Burlington County Jail, Fauver acted to relieve this problem on "a piecemeal basis" as opposed to the more comprehensive resolution he utilized in Essex and Camden Counties and eventually in Burlington County after it filed suit. Similarly, Call made affirmative decisions each week as to how many state prisoners would be removed from the Burlington County Jail as opposed to other county facilities. For purposes of this motion, I must assume that Call did so with knowledge of the *Vespa* consent order and of the general conditions in the Burlington County Jail.

Similarly, while Hogan has gone to great lengths to argue that he had no affirmative duty to act and was acting as a mere functionary in the implementation of the Freeholder's decision, there is evidence from which a jury could properly conclude that Hogan's role was that of an active participant in the resolution of the crisis at the Burlington County Jail.

There is deposition testimony, for example, that various Freeholders relied on Hogan to provide them with

facts relating to the county jail and together they discussed various options. Deposition of Catherine Costa at 4, 5 attached as Exhibit C to Plaintiff's Appendix in Opposition to Hogan's Motion for Summary Judgment; Deposition of Robert Shinn at 5, 6; Deposition of Michael Conda attached as Exhibit E to Plaintiff's Appendix in Opposition to Hogan's Motion for Summary Judgment at 114, 48-49. One Freeholder considered it Hogan's responsibility to ensure that the Freeholders complied with the *Vespa* consent decree. Deposition of Henry Metzger at 177-78 attached as Exhibit G Plaintiffs Appendix in Opposition to Hogan's Motion for Summary Judgment.

Perhaps Hogan best described his role when he testified:

> Often in a – I don't know whether you've had any experience in representing municipal bodies or not, but often in that relationship you will sit around a table like we are here today and have discussion of any number of topics, and *in that discussion there are comments and a give and take in discussion.*
>
> *Whether you can constitute that as advice* or giving advice or rendering opinions, that's for someone else to decide, but there were from time to time discussions about compliance with the federal court order and our discussions concerning – my discussions with the Freeholders surrounded compliance with that order.

Deposition of Michael Hogan at 33.

On this record there is an abundance of evidence that Hogan did no more than instructed to do by the Freeholders. Yet, if a jury were to conclude, based on this record, that Hogan's role was in fact more than implementing the instructions of his client – i.e. that as County

Solicitor he was a *de facto* player in these events – I would uphold that jury determination. Hogan himself appears to recognize that such a conclusion would not necessarily be erroneous. Hogan, as County Solicitor, used his judgment throughout his dealings regarding the jail. For instance, the Freeholders may have told Hogan to write Fauver a letter in December, 1981 but it was Hogan who wrote that letter. And how Hogan phrased the letter and the responses he invoked provide an affirmative link in the events leading to plaintiff's injuries. Similarly, it was Hogan who decided not to press the issue of state hold-overs with Fauver despite his knowledge that other counties had, by simply filing suit in federal court, received consent decrees which would have capped the county jail population at 117.

I emphasize that my analysis here is not based on any failure to act or on whether an of these defendants had authority to act. The responsibility for what happened to plaintiff allegedly falls on these defendants not because of what they failed to do but because each of these defendants took affirmative steps which could, in the eyes of a reasonable jury, properly be the basis for a finding of liability. *Cf. Black, supra.*

In light of the above discussion, it is obvious to me that Fauver and Call's reliance on *Martinez* is misplaced. In *Martinez*, the Supreme Court held that a parole board who released someone who later caused plaintiff decedent's death "did not 'deprive' appellant's decedent of life within the meaning of the Fourteenth Amendment." 444 U.S. at 285. 100 S.Ct. at 559. Simply stated, this death was "too remote a consequence of the parole officers'

action to hold them responsible under the civil rights law." *Id.*

In *Estate of Bailey v. County of York*, 768 F.2d 503 (3d Cir.1985), the Third Circuit held that a complaint against a welfare agency alleging that the agency, with knowledge that a child had been abused, failed to adequately investigate the mother before returning the child to the mother stated a claim. The district court had dismissed the claim based on *Martinez* because the cause of the child's subsequent death was directly attributable to the child's mother and her boyfriend who were not under the control or supervision of the state, 768 F.2d at 509. The Third Circuit reversed, finding the existence of a special duty under the particular facts of that case involving a minor and a welfare agency. The court noted that *Martinez* was being applied primarily to cases in which the defendant public official or entity had no custodial or other special relationship with the injured person, 768 F.2d at 510. Quoting a case from the Seventh Circuit, the court explained that "[i]f the state puts a man in a position of danger *from private persons* and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Id., quoting Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir.1982) (emphasis added by Third Circuit).

In this case, defendants Fauver and Call, by the acts discussed above, helped create the "snake pit" into which plaintiff was put against his will. Indeed, any suggestion that they did not understand the conditions they were fostering is belied by the record. Fauver indicated in his

deposition as well as in the Special Report on Overcrowding that conditions such as existed in October, 1983 in Burlington County could lead to fights. Certainly, Hogan had warned Fauver of the potential dangers.

I conclude that this case is factually distinct from *Martinez*. In *Martinez*, the defendants released a parolee into the general population and lost all control over him. In the case at bar, the defendants were part of a system that took plaintiff in and, against his will, placed him in an unsafe environment. While a finding that the conduct of Fauver and Call was a proximate cause of plaintiff's injuries is certainly not a fore-ordained conclusion, neither can that issue be taken away from the jury at this juncture.

* * *

Defendants Fauver and Call also move to dismiss the § 1985(3) claim. I agree that plaintiff has failed to show any class based discrimination which is, of course, the cornerstone of a cause of action under § 1985(3). *Berlanti v. Bodman*, 780 F.2d 296, 298 n. 3 (3d Cir.1985) *citing Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). This claim is dismissed. In light of my earlier remarks, I will also dismiss plaintiff's claims premised on the fourth, fifth and eighth amendments. Finally, I will dismiss, because of the eleventh amendment, plaintiff's complaint against Fauver and Call in their official capacities.

The court will enter an order reflecting this decision.